

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, : 08-CR-640  
v. : U. S. Courthouse  
ROBERT SIMELS, : Brooklyn, New York  
ARIENNE IRVING, :  
Defendants. : August 4, 2009  
9:30 o'clock a.m.

TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE JOHN GLEESON  
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

BENTON J. CAMPBELL  
United States Attorney  
By: STEVEN L. D'ALESSANDRO  
MORRIS FODEMAN  
DANIEL BROWNELL  
Assistant U. S. Attorneys

For the Defendants:

GERALD SHARGEL, ESQ.  
EVAN L. LIPTON, ESQ.  
For Robert Simels  
  
JAVIER A. SOLANO, ESQ.  
LAWRENCE BERG, ESQ.  
For Arienne Irving

Court Reporter:

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Proceedings recorded by mechanical stenography, transcript  
produced by CAT.

1 (Trial resumed.)

2 (In open court; jury not present.)

3 THE COURT: Good morning, everybody.

4 Please be seated.

5 Okay. Ready?

6 MR. SHARGEL: I'm ready to go.

7 My second witness will be here at 10:00 o'clock, Mr.  
8 Ricco, and I just spoke to him. My first witness is here, and  
9 there may be a short witness in between, but in the event that  
10 I don't have a witness and I'm waiting for Mr. Ricco, and he  
11 should be here at 10:00, I may need a ten-minute break. It's  
12 the only time that I have asked during the trial.

13 THE COURT: If that event arises, you'll ask for a  
14 ten-minute break and I'll rule on the request.

15 MR. SHARGEL: Very well.

16 MR. FODEMAN: I can take up a minute. When I was  
17 reading that excruciatingly long stipulation yesterday about  
18 when things were saved on the computer --

19 THE COURT: Yes. It was interesting.

20 MR. FODEMAN: -- of course, I made a mistake.

21 MR. SOLANO: A mistake that hurts.

22 MR. FODEMAN: Basically, I read Exhibit 802, which  
23 is not in evidence. 802 is the exhibit that we've been  
24 fighting about for a couple days. I should have read 800.

25 Do you want me to reread? Do you want to instruct

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1 them? Do you want me to instruct them? Do you want me to  
2 correct it on this?

3 THE COURT: Why don't we fix the page of the  
4 transcript.

5 No offense, but nobody was paying attention.

6 MR. FODEMAN: It was not the first time, I'm sure.

7 THE COURT: Agreed.

8 MR. SOLANO: Yes, your Honor.

9 THE COURT: All right.

10 Bring in the jury, please.

11 Who is your first witness this morning?

12 MR. SHARGEL: Edward Sapone.

13 (Jury present.)

14 THE COURT: Good morning.

15 THE JURY: Good morning.

16 THE COURT: Please be seated.

17 Mr. Shargel, call your next witness.

18 MR. SHARGEL: Yes. We call Edward Sapone.

19 E D W A R D S A P O N E,

20 having been duly sworn, was examined and

21 testified as follows:

22 THE CLERK: State your name and spell it, please.

23 THE WITNESS: Edward Sapone, S A P O N E.

24 DIRECT EXAMINATION

25 BY MR. SHARGEL:

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1 Q Mr. Sapone, what is your profession or occupation?

2 A I am an attorney.

3 Q And are you admitted to practice in the State of  
4 New York?

5 A I am.

6 Q Tell the jury how long you've been an attorney.

7 A I've been a practicing attorney with my own practice for  
8 a little bit over a year and -- nine years and one month.

9 Q Well, just to have the record straight, when were you  
10 admitted to practice?

11 A I was admitted to practice in June of 2000.

12 Q Now, tell the jury about your practice. What kind of  
13 practice do you have; what cases do you specialize in?

14 A I'm a criminal defense lawyer. I handle cases in the  
15 federal court, in this courthouse and across the bridge in the  
16 federal court in Manhattan, as well as the state court in  
17 Manhattan.

18 I handle federal and state cases, actually,  
19 throughout the country. I'm admitted in the Western District  
20 of Pennsylvania in the federal court, and in the federal court  
21 in Colorado. I'm admitted pro hac vice -- which means  
22 admitted just for that case -- in various jurisdictions,  
23 including Florida and New Jersey and Connecticut.

24 So, I'm a criminal defense lawyer who is based in  
25 Manhattan, but I have cases everywhere.

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1 Q Now, in the course of your practice, do you visit jails  
2 to meet with pretrial detainees?

3 A I do.

4 Q Did there come a time when I asked you to go to a certain  
5 jail?

6 A Yes.

7 Q And did you do that?

8 A I did.

9 Q Tell the jury which jail.

10 A The Queens detention facility, which is a private  
11 facility deputized as a federal detention center, located in  
12 Jamaica, Queens, New York.

13 Q When did you go?

14 A On June 4 of this year.

15 Q And that was pursuant to my request?

16 A Yes, sir.

17 Q Did you go to visit an inmate?

18 A I did.

19 Q And what was the name of the inmate?

20 A His name was Nicolai Dozortsev.

21 Q Was Nicolai Dozortsev your client?

22 A No.

23 Q Did you ever represent Nicolai Dozortsev?

24 A No.

25 Q In fact, you represented his brother in a case; correct?

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1 A Yes.

2 I have and still represent Arthur Dozortsev, and  
3 that's a case actually in this courthouse.

4 Q Now, tell us what happened when you went to the Queens  
5 facility in Jamaica. Tell the jury in your own words what  
6 happened that day.

7 A Sure.

8 You had asked me to go to the facility and see if I  
9 can request to see an inmate to have an attorney counsel with,  
10 and to see if I had to be that inmate's lawyer to go and see  
11 an inmate, see if I had to be his lawyer.

12 So, actually, I took my associate, Brianna Serra  
13 with me. She's been working for me for about two and a half  
14 years now.

15 We drove out to Jamaica. We parked. We walked into  
16 the facility. We were met by the door by an officer. We had  
17 our attorney ID cards. They call them the Secure Pass that  
18 gets you into the courthouses and the jails.

19 The officer took our cards and asked me what my  
20 client's name was. I said, Nicolai Dozortsev. She walked  
21 away to begin the process to get us into the facility. When  
22 she had come back, I said to her, Now, you had asked me what  
23 my client's name was. I just want to be clear with you.  
24 Mr. Dozortsev is not my client.

25 And she said, Oh, no. I was just asking you for the

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1 inmate's name. And I said, All right, because you had  
2 said "your client's name." I just want to be clear. Is it  
3 okay that it's not my client? She said, Yeah, you're an  
4 attorney. I just wanted the name of the person you were  
5 seeing.

6 At that point, we were escorted further into the  
7 facility. We went through the metal detectors. She filled  
8 out a book. In most detention centers, there's a form to fill  
9 out. In this one, there was none. She wrote some things in a  
10 notebook. We put our belongings like our cell phone, car keys  
11 in a locker.

12 They called upstairs for Mr. Dozortsev to come down  
13 to the main floor in the room where you see inmates. We went  
14 through a door or two, a heavy metal door. We went into the  
15 room, sat down. It was a very short meeting, in that I had a  
16 plane to catch, because I have a case out in Florida, so I had  
17 to get to Newark International Airport.

18 I saw Nicolai for about fifteen minutes, and then we  
19 left, got our belongings, chatted with the officer a bit, and  
20 exited the facility.

21 MR. SHARGEL: I have no further questions.

22 THE COURT: Thank you, Mr. Shargel.

23 Mr. Fodeman.

24 CROSS-EXAMINATION

25 BY MR. FODEMAN:

Sapone - cross - Fodeman

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1 Q Good morning, Mr. Sapone.

2 A Good morning.

3 Q Just a couple of questions?

4 When did you go to the GO facility.

5 A On June 4th.

6 Q Of this year?

7 A Yes.

8 Q And if I understood your testimony -- well, let me get  
9 some preliminaries out of the way. You were not there on  
10 March 27, 2008; is that correct?

11 A No.

12 Q And you weren't there -- the person you dealt with, was  
13 it a person by the name of Nicole Waite?

14 A No.

15 Q Someone different, a different corrections officer?

16 A I'm sorry. I thought you were referring to the inmate.

17 I don't know the name of the corrections officer,  
18 but I could describe the person.

19 Q What did they look like?

20 A It was an African-American woman, who I detected an  
21 accent from the Caribbean or Jamaica, and I think I had asked  
22 her, and I recall her saying, Jamaica. She was in her fifties  
23 or early sixties, if she aged well. She was about five-six,  
24 maybe 160 pounds, very nice woman.

25 Q And just so we can be clear: When that woman -- when



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1 that woman approached you or when you interacted with her, she  
2 asked you, Is that your client?

3 A Well, when I walked in and handed her the card, she said,  
4 What is your client's name?

5 Q What's your client's name? You gave information that was  
6 not true, initially?

7 A Well, look, I didn't mean to --

8 THE COURT: Answer the question.

9 A Well, it was true, in that Nicolai Dozortsev was not my  
10 client.

11 Q You told her something that was untrue; is that correct?

12 A Correct.

13 Q And then you had a subsequent conversation where you  
14 clarified it?

15 A Correct.

16 Q The only reason she knew that you were not -- that  
17 Nicolai was not your client was because you told her; is that  
18 right?

19 A I don't know if that's the only reason. But I certainly  
20 clarified it.

21 MR. FODEMAN: Nothing further.

22 MR. SHARGEL: I have nothing, your Honor.

23 Your Honor, I'm having a slight logistical problem,  
24 and my application is, we resume at 10:00 o'clock.

25 THE COURT: I take it there's nothing further for

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1 thi s wi tness?

2 MR. SHARGEL: No, your Honor.

3 THE COURT: Anything from you?

4 MR. SOLANO: No, your Honor.

5 THE COURT: You are excused. Have a good day.

6 THE WITNESS: Thank you, your Honor.

7 (Wi tness excused.)

8 THE COURT: I guess that's good news for you. You  
9 get a short break. Don't discuss the case.

10 All ri se.

11 (Jury excused.)

12 MR. SHARGEL: Judge, may I noti fy you when Mr. Ri cco  
13 arri ves?

14 THE COURT: If he's not, you're going to call some  
15 other wi tness at 10:00.

16 MR. SHARGEL: All right.

17 THE COURT: So, someone is going to be on that stand  
18 at 10:00 o' clock.

19 MR. SHARGEL: All right.

20 THE COURT: We'll resume in ten minutes.

21 (Recess.)

22 (In open court; jury not present.)

23 THE COURT: Okay.

24 MR. SHARGEL: Mr. Ri cco was seen at the metal  
25 detector. I can put Mr. Si mel s on. The problem I'm having,

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1 Mr. Ricco would be waiting here for hours, and he was waiting  
2 here for hours yesterday.

3 THE COURT: He's in the building?

4 MR. SHARGEL: Yes. Mr. Simels saw him at the metal  
5 detector.

6 THE COURT: All right.

7 Have a seat.

8 (Pause.)

9 MR. FODEMAN: Judge, if I can put this on the record  
10 while we're waiting?

11 THE COURT: Yes.

12 MR. FODEMAN: ST-1 is amended by agreement. It  
13 should read or include: "Government's Exhibit 800 was  
14 recovered from Government's Exhibit 607, a Dell Dimension E520  
15 desktop computer. Exhibit 800 was last saved on August 26,  
16 2008. Government's Exhibit 802 is not in evidence."

17 THE COURT: So stipulated?

18 MR. SOLANO: Yes, your Honor.

19 THE COURT: Mr. Shargel, so stipulated?

20 MR. SHARGEL: So stipulated, your Honor.

21 THE COURT: Bring in the jury, please.

22 THE COURT: Good morning, Mr. Ricco. Come on up,  
23 please.

24 THE WITNESS: Sorry for my delay, Judge.

25 (Jury present.)

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1 THE COURT: Okay. We're ready to resume. Please be  
2 seated, everyone, except the witness.

3 Would you please place the witness under oath.

4 A N T H O N Y R I C C O,

5 having been duly sworn, was examined and

6 testified as follows:

7 THE CLERK: State your name and spell it, please.

8 THE WITNESS: My name is Anthony Ricco, R I C C O.

9 MR. SHARGEL: I didn't say it formerly. We call  
10 Anthony Ricco as a witness on Mr. Simels's behalf.

11 THE COURT: All right.

12 DIRECT EXAMINATION

13 BY MR. SHARGEL:

14 Q Mr. Ricco, what is your profession or occupation?

15 A I'm a lawyer.

16 Q And how long have you been a lawyer?

17 A About twenty-nine years.

18 Q And could you tell us about your professional experience?

19 Tell the jury a little bit about your professional experience.

20 A Well, I like to say I'm a home-grown lawyer. I'm born  
21 and raised in Harlem. I grew up uptown. I still live there.  
22 I started my legal career in New York. I went to law school  
23 in Boston.

24 I came back to New York after school. I worked for  
25 a very distinguished judge, who is now deceased. His name was

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1 Bruce -- used to be termed as Bruce Turn 'Em Loose -- Wright.  
2 I worked for Judge Wright for about a year. After working  
3 with Judge Wright, I went into private practice. I have been  
4 in private practice for about twenty-eight years.

5 Q Can you tell the jury the type of cases you typically  
6 handle?

7 A The cases that I work on now are very interesting. I've  
8 worked on several cases with several people in the courtroom.  
9 Those cases range from cases involving international  
10 terrorism, racketeering. A great deal of my work today is  
11 death-penalty work, and that work has me involved in cases  
12 here and around the country. Most of my work is in the  
13 federal courts.

14 The work that I do enjoy the most, though, are cases  
15 that are well under the radar screen that just involve people  
16 in my community who have problems in court, and they come to  
17 me as a resource, and it's like a pleasure to represent them  
18 and help them.

19 Q Sir, are you a member of any bar association?

20 A A few.

21 Q Have you served as an officer of any bar associations?

22 A Reluctantly, but yes.

23 I served as president of the New York Criminal Bar  
24 Association for two years. I'm on the board of directors of  
25 the Federal Defenders here in New York for the Southern and

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1 Eastern Districts of New York, and I've served in different  
2 positions in relationship with my work with the courts on the  
3 Criminal Justice Act panel.

4 MR. SHARGEL: I ask that Mr. Ricco be permitted to  
5 testify under Rule 702 as an expert on criminal law and  
6 criminal defense.

7 THE COURT: Any objection?

8 MR. FODEMAN: No, your Honor.

9 THE COURT: Granted.

10 Hang on, Mr. Shargel, just for a minute.

11 Let me orient you to why this witness is here.

12 He's not a fact witness; right?

13 MR. SHARGEL: Correct.

14 THE COURT: He's not going to give testimony about  
15 any of the historical events that are much in dispute in this  
16 trial, and there will be more about this when I give you my  
17 instructions at the end of the case or after the evidence is  
18 over.

19 One of the crimes charged relates to the prohibition  
20 in the law against using intimidation or corruptly persuading  
21 others to influence their testimony and other things. And the  
22 law has built into it a provision that says -- these  
23 provisions don't prohibit providing lawful, bona fide  
24 legal-representation services in connection with an official  
25 proceeding, so the law recognizes that -- what it prohibits is

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1 not bona fide legal representation. It seems to me useful to  
2 you, in your job, at the end of the day here, I'm going to  
3 give you the ingredients of the crimes charged, what this  
4 obstruction-of-justice provision requires the government to  
5 prove beyond a reasonable doubt, and you're going to decide  
6 whether the government has proved it.

7 But since the law is clear that what it does not  
8 place out of bounds in terms of lawful conduct is the  
9 provision of bona fide legal representation. It strikes me as  
10 useful for you to hear from a witness -- from Mr. Ricco --  
11 about the sorts of things that bona fide legal representation  
12 includes.

13 All right. So, that's why he's here. He's not a  
14 fact witness. He's going to give testimony -- given his  
15 experience in the representation of criminal defendants, he's  
16 going to give testimony about the sorts of things defense  
17 lawyers do in providing legal representation, and, in my  
18 judgment, it will assist you in finding the facts of the case  
19 as I described a little earlier.

20 All right. Any objection to that introduction,  
21 Mr. Shargel?

22 MR. SHARGEL: No, your Honor.

23 THE COURT: Mr. Fodeman?

24 MR. FODEMAN: No, your Honor. Thank you.

25 MR. SHARGEL: Thank you.

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1 BY MR. SHARGEL:

2 Q After being retained by a client in a criminal case, I'm  
3 at the stage where someone is accused of a crime. What is the  
4 obligation of the lawyer to the client?

5 A Well, bring answer that question, I want to say this:  
6 It's difficult for jurors to understand what lawyers do on  
7 both sides, because most of what jurors know about lawyers do  
8 come from sources that are not accurate, television and  
9 newspapers.

10 So --

11 MR. FODEMAN: Objection, move to strike.

12 THE COURT: Sustained.

13 Strike it.

14 THE WITNESS: I'm sorry. Okay.

15 THE COURT: Let's stick to the question.

16 THE WITNESS: Okay.

17 Q The question is, once retained in a criminal case, what  
18 is the defense lawyer's obligation to the client?

19 A The defense lawyer's obligation to a client is to  
20 zealously represent him against the charges that are pending  
21 against him or her.

22 Q What does that mean, based on your experience?

23 A That means a lot.

24 It means that the lawyer should be interviewing,  
25 meeting with the defendant, and doing something that very few



1 lawyers do, which is listen. They need to be listening to  
2 what the person has to say about the case, about their lives,  
3 about their background, because the lawyer must develop with  
4 the client a relationship of trust and confidence.

5 Q Why is that necessary?

6 A It's necessary, because the lawyer -- the relationship  
7 with the client is one of trust. We want in our society  
8 people to be able to fully disclose to their lawyers their  
9 thoughts and ideas about the case. People don't naturally  
10 talk to things about the things that are close to their heart.  
11 In order to do that, the lawyer should be developing a  
12 relationship of trust. Now, of course, that changes from case  
13 to case and client to client.

14 But it is imperative that the lawyer be able to sit  
15 down and talk with the client, meet with the client's family,  
16 and begin to have the client feel comfortable discussing the  
17 predicament that the client finds himself.

18 Q Going forward with the client, what is the lawyer's  
19 actual obligation? In other words, what do lawyers do when  
20 they are preparing the case for trial?

21 A Well, in connection with the client, the lawyer will  
22 visit the client, the lawyer will listen to him, the lawyer  
23 will discover witnesses, the lawyer will investigate those  
24 areas of the case that the client thinks need to be  
25 investigated, and then ultimately, the lawyer will begin to

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1 investigate those things that he or she believes exist that  
2 the client doesn't tell him about. But the lawyer should be  
3 bringing in experts if experts are needed. The lawyer should  
4 be bringing in investigators. But the lawyer should be  
5 proactively working to defend the person that they are  
6 representing.

7 Q Is there an obligation to follow suggestions of the  
8 client, factual suggestions made by the client?

9 A Well, the lawyer should follow the factual suggestions of  
10 the client. It's one of the ways in which you develop a  
11 relationship of trust with an individual. The lawyer should  
12 listen to what the client has to say. If the client is  
13 directing the lawyer towards a witness or a fact or a  
14 circumstance, the lawyer is then obligated to investigate  
15 that, to follow it through to see whether or not it has any  
16 validity.

17 Oftentimes, people tell you things that are  
18 nonsense. Well, the only way that you are able to determine  
19 that it's nonsense is to go out and investigate it and figure  
20 out what, if any, value it ultimately has.

21 Q You have represented people who are alleged to be leaders  
22 of criminal gangs and the like, have you not?

23 A I have represented people who have been involved in  
24 street gangs. I have represented people who have been  
25 involved in organized crime, in organized crime families. And

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1 I have represented individuals who have been part of  
2 international organizations, like Al Qaeda.

3 Q And in representing those people, do the conversations  
4 that take place differ from perhaps the way you are speaking  
5 in court today?

6 A Well, for me, my conversation doesn't change from person  
7 to person and place to place, because that's just my  
8 personality. I generally try to talk the same way to people  
9 all the time.

10 However, every case is different, and what you're  
11 trying to do in any particular case is that you are trying to  
12 communicate with the person that you are representing, and  
13 that will change. People who are charged in an indictment  
14 with being bosses of drug organizations, they act like bosses.  
15 They are used to tell people what to do. They are used to  
16 ordering people around. Your relationship with them is a  
17 little different than a person who is charged as being a  
18 driver who is a young person who has a very minor involvement  
19 in the case. So, oftentimes, you utilize your experience in  
20 life, your skill as a person, your ability to talk and reason  
21 with people, to find out where they are and try to deal with  
22 them on that level.

23 Q Now, do you personally as a lawyer, and based on your  
24 experience with other lawyers, as well, conduct interviews  
25 from time to time?

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1 A I do. I conduct them myself. I don't think, with the  
2 exception of one time early in my career, I have never put a  
3 person on the witness stand that I did not interview. I did  
4 that once very early on, and that will never happen again. I  
5 conduct the interviews myself.

6 I would have to tell you, my own practice and many  
7 lawyers' practice is to have an investigator go out and  
8 conduct interviews, and the investigator will then give you  
9 further information, and sometimes you will go out and follow  
10 up in that way.

11 Q The testimony that you gave about relating to clients and  
12 the manner of speaking to clients, is that applied to  
13 witnesses, as well?

14 A Absolutely.

15 Oftentimes, the witnesses that you go out to  
16 interview are people who are -- claim to be or are part of the  
17 criminal enterprise that's under investigation. They are  
18 people who are near and dear to the scene. They know  
19 something. That's the reason why you're speaking to them in  
20 the first place. So, what you do is, you want to relate to  
21 people in a way in which they talk, in which it makes sense to  
22 them.

23 Q Do you ever find, again based on your experience and the  
24 knowledge of the common experience of other lawyers, that  
25 witnesses sometimes lie at the beginning?

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1 A I think that that's probably a common experience for most  
2 people in life. You know, unfortunately, we live in a world  
3 where people are not very forthcoming. I think that's  
4 probably a common experience for both lawyers, that you have  
5 to overcome barriers with people, and sometimes you don't.  
6 There are some situations you meet people and they give it to  
7 you right from the beginning and you feel blessed when that  
8 happens.

9 Q Now, ultimately, at the end of the day, as they say, who  
10 decides -- whose decision is it as to which witnesses to call  
11 or not call at a trial?

12 A Well, that is an issue of contention. But there is an  
13 answer to the question. And I say an "issue of contention,"  
14 because oftentimes, you represent people when they think they  
15 ultimately have that decision. The reality of it is, and our  
16 courts and our circuit have held, it's the lawyer's decision.  
17 At the end of the day, it's the lawyer's job to determine what  
18 will be presented in the courtroom, what will actually be  
19 presented by way of evidence, by way of the witnesses, who  
20 will actually be called.

21 Q When is that decision made?

22 A Well, you know, that varies from case to case. In some  
23 cases, that decision is made after the jury is selected. In  
24 most cases, you want to know what you are doing before you  
25 start selecting the jury.

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1 But it is not uncommon for you to represent people  
2 who are in complete denial about facts and circumstances  
3 involving very serious cases, and you're struggling with them  
4 all the way up to trial to get them to understand that what  
5 they believe in is a fantasy and that the best way is to  
6 pursue a different course. And oftentimes, that decision is  
7 made on the eve of trial. Certainly, my own practice is, I  
8 don't like to open in front of a jury on a theory that I have  
9 not discussed with my client and I've gotten my client to  
10 agree with. But sometimes, that decision doesn't happen until  
11 the very last moments in the case.

12 Q Are there situations where you don't learn the true facts  
13 until the time of trial?

14 A Yes. And there's some situations where you don't learn  
15 the true facts until after the trial.

16 You know, it varies from case to case. And it's  
17 interesting, because there's a different philosophy amongst  
18 lawyers about representing people. Some lawyers say, Look, I  
19 don't want to know what happened. They try the case based on  
20 whatever the government provides to them by way of discovery,  
21 by way of 3500 material. They don't want to know.

22 Q Explain what 3500 material is.

23 A These are documents that are developed by the government  
24 in the course of its investigation dealing with witnesses's  
25 statements that they are obligated to turn over to the defense

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1 in preparation of the trial for witnesses that we will call.

2 And many lawyers will say, Well, I don't want to  
3 know what happened from the defendant. But other lawyers do  
4 want to know.

5 I'm of the school of lawyers I want to know. I want  
6 to know the worst. Tell me about that. I find that it's  
7 really the only effective way that you can represent people,  
8 particularly in cases where people are facing spending the  
9 rest of their natural life in penitentiary or where people are  
10 facing the death penalty, where you want to know what  
11 happened.

12 Oftentimes, you represent people for the first time  
13 who never dealt with people who have tried to get them to deal  
14 with their situation forthrightly and honestly. In many of  
15 these cases where their life is at stake, where they are  
16 facing the death penalty, where, if you were ever going to do  
17 something, right now is the time to do it, a lawyer spends a  
18 lot of time, we spend a lot of time in the jails getting the  
19 defendants to understand that a different course of action  
20 needs to be taken other than what they think should happen.

21 Q If a client in a case insists that he's innocent, does  
22 that stop your investigation to see whether the facts would  
23 prove otherwise?

24 A No.

25 Q What would you do under those circumstances?

Ricco - direct - Shargel

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1 A I continue to investigate the case and come to my own  
2 conclusion. I never base the defense I put on at trial off of  
3 what a defendant tells me in one of these jails. You have to  
4 go out and do your work.

5 Q And "work" involves investigation?

6 A That's correct.

7 Q You've dealt with many clients in local jails?

8 A Well, the bane of the existence of a criminal defense  
9 lawyer are the hours that we spend in jails with our clients.  
10 Many clients are held without bail, and so therefore the only  
11 way that the lawyer can interview with them is to go to the  
12 jails. And we spend a great deal of time, all lawyers do, in  
13 the jails meeting with clients and discussing their cases.

14 Q When you set out to do the investigation early in the  
15 case -- getting back to the point after first retained -- are  
16 you provided with those statements of witnesses or a list of  
17 witnesses?

18 A Generally, no. I mean, there's some cases when that  
19 happens, but that's very rare. I mean, generally, you're  
20 starting out from scratch, you and your client.

21 If it's a controversial case, then you will have  
22 information that you would have picked up by the nature of the  
23 case. But in an ordinary case, you are pretty much starting  
24 out with the information that's being provided to you by the  
25 person that you represent.



Ricco - direct - Shargel

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1 Q Does a criminal defense attorney have subpoena power?

2 A Yes, the criminal defense lawyer does have subpoena  
3 power. If there's evidence that we want to see, if there's a  
4 witness that a defense lawyer wants to call, the lawyer has  
5 subpoena power.

6 Q Meaning that the lawyer can require the attendance of a  
7 witness at a proceeding; right?

8 A Compulsory process. They will be compelled to come.

9 Q Is there any type of process that a criminal defense  
10 lawyer has to require a person to speak to them or their  
11 investigators?

12 A No.

13 A person has the absolute right to tell any defense  
14 lawyer, any defense investigator, that they don't want to  
15 speak to them. What they don't have a right to is to resist  
16 the power of a subpoena. So, that person can be served with a  
17 subpoena, and they will be compelled to come to court. They  
18 will get on the witness stand and have to testify.

19 Q Can a subpoena compel a person to come to your office in  
20 Manhattan and sit down and appear in front of you to talk?

21 A No.

22 Q There's no compulsory process to have that happen; right?

23 A No.

24 Q And what happens ultimately where you're convinced that a  
25 witness is not being truthful? Is there a prohibition about

Ricco - direct - Shargel

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1 putting such a witness on the stand?

2 A Well, yes. A lawyer should -- well, there's been a  
3 recent change in the Rules. As of April 1, 2009, the Rule has  
4 been changed to say that a lawyer "shall not" and "shall  
5 report." But prior to April 1, 2009, in this jurisdiction, a  
6 lawyer was obligated not to present evidence in a case that  
7 the evidence he thought was false or perjurious.

8 A person is entitled to representation, but they are  
9 not entitled to a perjurious presentation of evidence in a  
10 courtroom. They can think all they want to think in the  
11 jails. When it comes time to what is put on the witness  
12 stand, a lawyer is obligated to inform the Court that the  
13 lawyer believes that the witness is about to or has testified  
14 perjuri ously.

15 Q You said a moment ago that despite what people say in the  
16 jails, I think those were your words, is there a lot of talk  
17 about what someone is going to do before it actually reaches  
18 the point of a trial?

19 A Again, I would have to say yes and no.

20 Some people you represent are forthright. They do  
21 help you. They are interested. Many clients are not  
22 forthright. And all lawyers that practice in this courthouse  
23 experience difficulties with clients around those kinds of  
24 issues.

25 Sometimes, you know, there's an old saying that

Ricco - direct - Shargel

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1 says, You can't whistle past the graveyard. There are a lot  
2 of clients who think they can whistle past the graveyard, and  
3 what they often will do is, talk about things that at the end  
4 of the day are not relevant to the case, are not important to  
5 the case, and the lawyer's great struggle is to present a  
6 defense within the four corners of the law, because a lawyer  
7 in his representation of a client is bound by the law.

8 A lawyer has a dual oath. The lawyer has the oath  
9 that he takes to the court. A defense attorney is an officer  
10 of the court, and he's dutybound not to see that fraud or  
11 deceit happens before the Court, and the judges expect that of  
12 the lawyers, and a lawyer can be sanctioned and disbarred for  
13 participating in proceedings where they allow and suborn  
14 perjury or false presentation of evidence. You can lose your  
15 license for it, and some people can go to jail for it,  
16 depending on what it is.

17 Q Are there times when it's necessary for you, sir, again  
18 based on your experience and your interaction with other  
19 lawyers, is it necessary to persuade a client or a witness  
20 that a certain course of conduct is not either in the best  
21 interests -- their own best interests, the client's best  
22 interests, or the law?

23 A I think the answer to that question is obviously yes.

24 Not only do people fantasize, people -- I mean  
25 defendants -- have a fantasy about where they are and how they

Ricco - direct - Shargel

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1 can get out of it, but they are connected to people in the  
2 street. You talk about organized crime people. They have  
3 connections. They have friends. They have people who are  
4 used to following orders from them. Their friends support  
5 them and their concept of, you know, what should happen. So,  
6 they'll lie. They'll make up a story. They cook a defense up  
7 in the jail, and they'll get somebody on the outside to say  
8 there was a witness and they saw this or that. You want to  
9 interview these people to find out whether or not they are  
10 telling the truth, whether or not it makes sense. Oftentimes,  
11 it doesn't. That problem has existed for both the defense and  
12 the government. I mean, the whole process of third-party  
13 cooperation was changed, because it was being exploited.

14 Q Are there times, whether it's in a jail or in your  
15 office, when you are listening to talk that's essentially  
16 going nowhere and not leading to a witness stand?

17 A The answer is yes.

18 One thing that people don't see is the level of  
19 commitment and work that all lawyers, both prosecutors and  
20 defense lawyers, bring to the cases that people see in the  
21 courtroom. This is just the tip of the iceberg. The level of  
22 work and preparation is extraordinary, and it should be, and  
23 it happens, and a lawyer's job is to apply that effort to the  
24 case.

25 And the more entrenched the defendant is in

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1 organized crime or in a drug gang or in things like that, the  
2 more difficult it is to get them out of the role of being a  
3 boss or manager or lieutenant, and begin to make them realize  
4 that you are now a defendant who faces a lot of time, and the  
5 way you used to go about thinking you can manipulate things is  
6 not going to work. So, the lawyer should be trying to  
7 dissuade the defendant from doing these things. In fact, the  
8 lawyer is obligated to do that.

9 I spoke moments ago before, the rules of ethics  
10 changed that said the lawyer has to inform the Court when the  
11 lawyer believes that perjury will happen or some false  
12 evidence will be presented. Well, the rules of ethics say  
13 that that should be a last resort. The rules of ethics say  
14 that the lawyer should try to dissuade the defendant first,  
15 then see if other steps can be made. In some cases, a  
16 firewall can be established to sort of filter out evidence  
17 that the lawyer ultimately believes has no value and  
18 credibility.

19 I said "ultimately believes." You have to find that  
20 out. How you find that out varies from person to person.

21 Q When you, say, dissuade or persuade someone not to take a  
22 certain course of action, is it always, Stop this talk or I'll  
23 call the police, or are there different ways that you can  
24 persuade a witness or a client not to take a certain course of  
25 action that's not correct?

Ricco - direct - Shargel

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1 A However you do it, you should do it.

2 People don't respond to -- forgive me. People don't  
3 respond to what you first said.

4 Q Calling-the-police model?

5 A That's right.

6 In fact, the law doesn't even sanction the lawyer  
7 leaving the case, because the courts have said if the lawyer  
8 just leaves the case, then there's a greater likelihood that  
9 the perjury will happen, because the one person who the Court  
10 can rely upon to disclose it is now gone, and the new lawyer  
11 may not be told that information.

12 And so, you don't -- you're not a cop. You're the  
13 person's lawyer. You're there to help them. You're there to  
14 help them see a course of action to take.

15 And some of these cases, you're trying to tell  
16 people that a plea to forty years in a penitentiary is in  
17 their best interests, and some cases, you spend time with  
18 young people trying to persuade them that life in a  
19 penitentiary without the possibility of parole is in their  
20 best interests.

21 You don't, by telling people, Stop, or I'm going to  
22 call the police. I know you are being --

23 Q Facetious?

24 A Right. Your word, not mine.

25 But what you really want to do is help people

Ricco - direct - Shargel

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1 understand the situation that they are in. Sometimes people  
2 come to you with something and I always tell our  
3 investigators, Go out and investigate it. Let's see if it has  
4 value, and come back and approach them with it and try to show  
5 them that's not going to work. At the end of the day, this is  
6 going to get you a life sentence. At the end of the day, this  
7 may get you the death penalty. So, you want them to be a part  
8 of what you're doing, and the best way to do that is to talk  
9 to people in a way in which they can understand and follow.

10 But if the person persists in presenting something  
11 that the lawyer ultimately believes is a fabrication or  
12 something that is false, and the lawyer cannot dissuade the  
13 client from pursuing that course, and the lawyer contacts a  
14 government agency or a law enforcement agency and it cannot be  
15 dealt with by way of a firewall or something like that, then  
16 the lawyer is now obligated -- the law now says, Shall inform  
17 the Court of the problem, so that the Court can ultimately  
18 decide how the matter should be resolved.

19 Q Is a lawyer permitted -- is a defense lawyer permitted to  
20 interview or attempt to interview a cooperating witness,  
21 someone who has agreed with the government to cooperate or to  
22 do undercover work? What's the rules -- what are the rules on  
23 that?

24 A Well, the basic rule is that no party has a right to a  
25 witness. No one is a defense witness, or is owned by the

Ricco - direct - Shargel

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1 government or owned by the defense. You are either a witness  
2 or you're not a witness. You just happen to be called by  
3 either party.

4 Cooperating witnesses is a very dangerous area.  
5 Most lawyers will not attempt to contact a cooperating witness  
6 unless the government is aware of it. It is an area of great  
7 danger, because many cooperating witnesses are at great risk,  
8 and the lawyer always has to be careful that he doesn't do  
9 anything that would cause harm to a particular witness, and  
10 that should be foremost in a lawyer's mind as he approaches  
11 that type of witness.

12 And it doesn't necessarily have to be a cooperating  
13 witness. It should be all witnesses. Lawyers should always  
14 be mindful of people's rights and who they are. Some people  
15 don't want to talk to lawyers, and you should leave them  
16 alone. They want to talk, they don't want to talk. We'll see  
17 them when they get in the courtroom.

18 So, the area that you are talking about is a very  
19 dangerous area.

20 Q Is there a right on the part of a lawyer to interview or  
21 attempt to interview a cooperating witness, however?

22 A There is no such right. The cooperating witness has the  
23 right to say, I don't want to talk to you.

24 Q Is there a right for the defense lawyer to attempt to  
25 interview the cooperating witness?



Ricco - direct - Shargel

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1 A There's no such right. The lawyer has an obligation to  
2 do so. Part of the lawyer's canon of ethics says that he  
3 should vigorously pursue the defense, and that means  
4 witnesses. You as a lawyer have an obligation to do that. If  
5 you don't do it, then you're going to have to account for it  
6 later on, when the person is convicted. They are going to say,  
7 You didn't do this and you didn't do that and that's why I got  
8 convicted, and you'll be on a witness stand like this, at a  
9 2255 proceeding trying to explain why you didn't do all these  
10 things to represent the defendant.

11 Q Are there situations where an investigation discloses  
12 information about a cooperating witness that the government  
13 doesn't have, information that the government doesn't have?

14 A Oftentimes.

15 Q And describe that for the jury.

16 A Well, what makes cooperation -- what we know as  
17 cooperation in the federal system work is when the individual  
18 is honest with the government about their situation. It's the  
19 thing that makes their testimony reliable. You know, they  
20 have this agreement that says -- they have the potential not  
21 to serve time, and they work out an agreement with the  
22 government. But the linchpin of the agreement with the  
23 government is that they are truthful.

24 There are some situations when people, like all  
25 people, we talk about defendants withholding information.

Ricco - direct - Shargel

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1 Well, people who cooperate used to be defendants, and they  
2 sometimes withhold evidence from the government. When the  
3 government finds out about it, the government will tear up  
4 their agreements. But there are times when the government  
5 does not find out about it, and all lawyers have had that  
6 experience where they find that kind of information out. That  
7 information creates a dilemma for the lawyer.

8 Q Could you explain that?

9 A Okay.

10 When a lawyer finds out that a cooperating witness,  
11 or any witness that the lawyer believes the government is  
12 going to call, but particularly a cooperating witness, has  
13 withheld some information and the lawyer believes that it's  
14 material, it's important to the proposed testimony, that  
15 lawyer could sit on that information and decide that they will  
16 spring it when that person is on the witness stand, having  
17 told the jury, raised their hand, I'm telling you the truth  
18 and I told the government everything, and then the lawyer, the  
19 defense lawyer, will utilize the information that they have  
20 done their homework for. They shouldn't be asking the  
21 questions unless they have a good-faith basis for asking those  
22 questions.

23 Q Could you explain a "good-faith basis," please?

24 A A "good-faith basis" means that the lawyer has conducted  
25 some investigation and the lawyer believes that what the

Ricco - direct - Shargel

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1 lawyer was first told has some validity to it such that the  
2 lawyer feels comfortable and confident that the question to be  
3 asked of the witness has a basis of fact. So, that lawyer  
4 then utilizes that information that they found to get the  
5 surprise value out of it, sort of like the I-got-you: You  
6 told the jury -- the government you was going to tell the  
7 truth, and you didn't tell them about this murder or the money  
8 that you hid, and it blows the witness up, so to speak.  
9 That's one course.

10 But sometimes a lawyer will provide that information  
11 to the government. They'll say to the government, You know,  
12 we found out this information about it. It can be before  
13 trial, a lot of work has gone into it, and then the government  
14 will take the information, look at the information, and decide  
15 what to do with the case.

16 A lawyer will pick those strategies based on what  
17 the client wants and what the lawyer believes will work in the  
18 client's best interest.

19 Q One choice -- if I have this correctly, one choice is to  
20 hold the information and wait for cross-examination; right?

21 A With the hope that they'll get an acquittal.

22 Q And the other choice is to bring the information to the  
23 prosecutors to essentially resolve the matter that way; in  
24 other words, to demonstrate that the witness is not credible?

25 A Using the information short of a trial, a lawyer would

Ricco - direct - Shargel

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1 want to present that information to the government with the  
2 hopes towards getting a favorable plea disposition in the  
3 case.

4 Q Or that the witness would not be called?

5 A Perhaps.

6 Q And is there a difference -- again, based on your own  
7 experience and common knowledge of lawyers -- is there a  
8 difference to approach as to how you investigate a case,  
9 whether it's an organized crime case or white-collar, or is it  
10 essentially the same obligation?

11 A Well, the obligation is the same. The way you go about  
12 it is different.

13 Q All right?

14 Have there been situations where a witness or a  
15 client is saying things that are not true, but you continue to  
16 speak to that person? Let's limit the question. I'll break  
17 it down as to a witness, the witness in the case that you are  
18 interviewing, and you think that the witness isn't telling the  
19 truth. Would you stop there, or would you continue.

20 A Most lawyers who are doing their work, who want to be in  
21 a position to advise their clients as to what their options  
22 are, will pursue a matter until they are satisfied that they  
23 have enough information to give advice on. They are satisfied  
24 that something is either being told to them that's a complete  
25 lie, something is told to them is just not supported by the

1 evidence.

2 You know, a lot of practice in law is like life.

3 You know, it's no different. You know, you continue to try to  
4 find the information. I mean, ultimately, a trial is a search  
5 for the truth, and so both sides are very interested. Both  
6 the prosecution and the defense are very interested, at least  
7 they should be interested, in trying to get as close to that  
8 goal as possible. And because, you know, a lot of the people  
9 is that we represent have had a history of, you know, criminal  
10 history, a history of problems, you have to really check out  
11 what they are telling you, and you got to do your own  
12 homework.

13 I call it -- well, never mind.

14 Q I would like to hear what you call it. What do you call  
15 it?

16 A My own philosophy, I call it the Malcolm X theory of  
17 practicing law. Malcolm X used to have a very famous  
18 statement. He used to say, Well, if you know it's going to  
19 rain, take your raincoat. What he meant by that is, be  
20 prepared. A defense lawyer should be prepared. Every lawyer  
21 should be prepared, and I believe in being prepared.

22 Q Have you ever experienced a situation or know of a  
23 situations where a potential witness or a cooperating witness  
24 has attempted to extort money from a defendant?

25 A That happens occasionally. I was in that kind of

Ricco - direct - Shargel

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1 situation myself, and it is a very troubling thing to happen.

2 Q When that happens, is one option to bring the matter to  
3 the attention -- after being able to prove it -- bring it to  
4 the attention of the prosecuting attorney?

5 A Again, let me say this. Again, as a general rule, a  
6 lawyer's obligation to disclose this information now has  
7 certain parameters that it didn't have before April 2009.

8 But having said that, you need your common sense.  
9 The lawyer has an obligation to do it; that is, to once he has  
10 some evidence of this, even under the old rules, had an  
11 obligation to disclose that information ultimately to the  
12 Court, has an obligation to discuss it with his client, has an  
13 obligation to seek a firewall.

14 In the situation that I confronted was a case  
15 involving an organized crime individual, and an individual  
16 offered a \$250,000 bribe for him not to testify. And he wrote  
17 it down on a pad, the amount on the pad, and he turned the pad  
18 around and told me did I see the number? I said, Yes. He  
19 turned the pad back, he tore the piece of paper off, he rolled  
20 it up into a little ball, he stuck it in his mouth and he  
21 swallowed it.

22 I'm sitting there saying to myself, This guy tried  
23 to bribe me. I was at Trenton State Penitentiary when that  
24 interviewed happened. I walked out of the jail and made three  
25 telephone calls.

Ricco - direct - Shargel

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1           The first telephone call I made was to an Assistant  
2 United States Attorney in the Eastern District named Mark  
3 Feldman, the second call was to the FBI agent that was working  
4 on the case, and the third call was to the trial judge, to let  
5 him know that I wanted to come into chambers tomorrow morning  
6 at 9:30, because something had happened that I thought would  
7 influence the case.

8       Q     In other words, once you had the evidence, which was the  
9 imprint on your own pad, is that what it was?

10      A     I didn't say that. That's what happened.

11      Q     Even though he ate the first page, the second page had  
12 the imprint?

13      A     That's right.

14           Going back to the point that I was making, a lot of  
15 people you represent are locked up. They have really good  
16 ideas about what they are doing, but they always trip  
17 themselves up. What the person did was, he gave me the pad  
18 back, and I knew that the imprint would be on the pad.

19      Q     Once you had the evidence, you brought the evidence --

20      A     I turned it over to the Eastern District prosecutors  
21 here, right here at Downtown Brooklyn.

22           MR. SHARGEL: May I just have a moment, your Honor?

23           THE COURT: Yes.

24           (Pause.)

25           MR. SHARGEL: I have no further questions, your

Ri cco - cross - Fodeman

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1 Honor.

2 THE COURT: Thank you, Mr. Shargel .

3 Mr. Fodeman.

4 MR. FODEMAN: Thank you, your Honor.

5 CROSS-EXAMI NATION

6 BY MR. FODEMAN:

7 Q Good morning, Mr. Ri cco.

8 A Good morning, Mr. Fodeman.

9 Q We've worked together on cases in the past?

10 A Yes, we have.

11 Also with Mr. Brownell , everyone else at the table.

12 Q I just want to start off with a question that Mr. Shargel  
13 asked you. He said, The way you go -- he asked you, Is it  
14 di fferent the way you go about handling a white-collar case  
15 versus an organized crime case? And I think you answered, if  
16 I'm not mistaken, Yes, there is a di fference?

17 A Yes. The obligation is the same, but the way you go  
18 about the work is di fferent.

19 Q And because Mr. Shargel didn't ask you, I'm going to ask  
20 you the follow-up question: Can you explain to the jury why  
21 that's di fferent?

22 A Yes. Because -- it's because of the nature of the people  
23 who are charged with those crimes. They come from, generally  
24 -- they come from di fferent backgrounds, di fferent  
25 experi ences.



1           You know, I'll break it down as simple as street  
2 people versus people who are involved in white-collar crime,  
3 who have had the benefit of education, privilege. Some of  
4 them, the fear of going to prison is very great, and sometimes  
5 they are more forthcoming, but not always. And their crimes  
6 are hidden in the papers. There's a paper trail, and the way  
7 you check through a paper trail is different than the type of  
8 street crimes that people who are in gangs from out of the  
9 neighborhoods, gangs that are organized crime. They have a  
10 different background. The fear of jail for them is not as  
11 great. They are not going to make a decision because they are  
12 scared to go to jail, out of fear, and so sometimes you have  
13 to approach them about what's right for them or their family  
14 or their children. You try to find a different way to go  
15 about investigating the cases, and you have to gain their  
16 confidence.

17 Q   Is it also fair to say -- I don't want to put words in  
18 your mouth, maybe you have already said this -- that when you  
19 are investigating a case involving violence and the specter of  
20 organized crime or drug gangs or something like that, you have  
21 to be particularly careful about the people with whom the  
22 defendant is associated? Dealing with witnesses, it's  
23 different in that kind of case?

24 A   Very much so.

25 Q   I am sorry.

1 A Very much so, because the level of violence that we see  
2 in society and the level of violence that we see in these  
3 cases is very high.

4 And when people are connected to people in the  
5 street, you never really know how the people in the street are  
6 thinking, also, so something can be said in joke -- in jest,  
7 but someone on the street can go out and do something.

8 (Continued on next page.)  
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Ricco - cross/Fodeman

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1 BY MR. FODEMAN:

2 Q In other words -- to put a fine point on it -- you're  
3 representing someone who is charged with stock fraud, he  
4 worked at Bear Stearns, okay -- you might handle that person  
5 differently than you might handle the client who was alleged  
6 to have been part of a violent drug gang?

7 A That's right.

8 Q But you have to be careful that the people in the violent  
9 drug gang aren't going to do things that would hurt people; is  
10 that fair to say?

11 A No question about it. I think that should be in the  
12 forefront of every lawyer's mind on both sides of the aisle,  
13 and it usually is.

14 Q You told us in the beginning that your obligation as a  
15 defense attorney is to zealously represent your client; is  
16 that correct?

17 A Yes. And that's just not my saying that, that's our  
18 ethical code.

19 Q That's the rules?

20 A That's the rules.

21 Q Does that include doing things such as investigating the  
22 case?

23 A Yes.

24 Q Speaking to witnesses?

25 A Yes.

Ricco - cross/Fodeman

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1 Q Following up on leads?

2 A Yes.

3 Q Speaking to your client at length?

4 A Yes.

5 Q Exploring the lead that he or she provides you with?

6 A Yes.

7 Q Visiting him or her in the jail?

8 A Yes.

9 Q Learning as much as possible about the prosecution's  
10 case?

11 A Yes.

12 Q If possible, speaking to cooperating witnesses, if  
13 possible?

14 A Yes.

15 Q I just to make sure what you said. You said there's a  
16 dual obligation; is that correct?

17 A Yes.

18 Q What you meant by that -- correct me if I'm wrong, I  
19 don't want to put words in your mouth -- but you have a dual  
20 obligation both to your client and to the court, is that fair  
21 to say?

22 A That's correct. And the higher obligation is to the  
23 court.

24 Q And, in fact, the duty to zealously represent your client  
25 is not without limits, is that fair to say?

Ricco - cross/Fodeman

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1 A It is not without limits. It's within the bounds of the  
2 law and it's within bounds of what the court expects from the  
3 defense lawyers.

4 Q Perhaps this is obvious, but lawyers aren't permitted to  
5 commit crime in an effort to zealously represent their client;  
6 is that correct?

7 A Even when the rules change, lawyers are not entitled to  
8 further criminal activity on behalf of clients, period.

9 Q That was true before April first, 2009 and true after  
10 April first, 2009?

11 A That's correct.

12 Q There's a limit --

13 A Yes.

14 Q -- to what a lawyer can do?

15 A Yes. And the limit is within the rules of law and the  
16 lawyer's ethical obligations to the court and to the client.

17 Q So, for example, if a client wants you to engage in some  
18 form of criminal activity, even if you agree with him that  
19 could result in helping his case, you can't do it?

20 A Won't happen.

21 Q Anthony Ricco wouldn't do it?

22 A Wouldn't happen.

23 Q Lawyers can't do it?

24 A Lawyers are not allowed to do it.

25 Q Even if it would help the client?

Ricco - cross/Fodeman

1157

1 A Not allowed to do it.

2 Q Now, you told us a little bit about the defense  
3 attorney's subpoena power and the resources available to a  
4 defense attorney.

5 A Yes.

6 Q I want to explore that for a few minutes.

7 A Certainly.

8 Q You said that you have the power to subpoena a witness to  
9 court; is that correct?

10 A Yes.

11 Q So, for example, if a lawyer in this case wanted someone  
12 to come to court last Monday when the trial started, they  
13 could issue a subpoena or have the court issue a subpoena, say  
14 be at Judge Gleeson's courtroom, 6C, 10:00 a.m., Monday the  
15 27?

16 A That's right. The defendant's right to have subpoena is  
17 a constitutional right that he has. It's his right to  
18 compulsory process. Part of that is the right to utilize the  
19 services of the court to compel a person to come into court to  
20 provide testimony.

21 Q Let's explore what means. That means if a person doesn't  
22 up on Monday --

23 A The marshals go out and bring him in here.

24 Q Bring him in, in handcuffs?

25 A If necessary.

Ricco - cross/Fodeman

1158

1 Q You've seen that happen in a number of cases I'm sure?

2 A Many times.

3 Q What you said a lawyer can't do is force a witness to  
4 come and speak to him at his office, is that fair to say?

5 A That's correct.

6 Q A witness or prospective witness can just say I'm --  
7 either to it nicely, say, I'm sorry, I don't want to do it, or  
8 say it less nicely; is that fair to say?

9 A That's right.

10 Q You have had occasions where it happened both ways?

11 A Yes.

12 Q And that includes not just coming to your office but also  
13 speaking with an investigator who might go out and find this  
14 person?

15 A That's correct.

16 Q The person can say, No, thanks for coming out but I'd  
17 just rather not talk to you, see you in court, he could say?

18 A That's right.

19 Q Now at that point, as a lawyer maybe this is obvious, but  
20 you can't kidnap that person and bring them to your office, I  
21 mean that's so ridiculous -- it's obvious, right?

22 A Well, I don't know if it's obvious but you can't do it.

23 Q You can't do it. How about using other people to  
24 forcibly take people and bring them to meet you, can you do  
25 that?

Ricco - cross/Fodeman

1159

1 A No.

2 Q That would be a crime, right?

3 A Yes, called kidnapping.

4 Q You can't do it?

5 A Can't.

6 Q I see you smiling.

7 How about -- let's take this scenario. You go and  
8 you try to talk to a witness, you go out there, and I say you  
9 or a defense investigator, and the witness says, You know  
10 what, I'd rather not talk to you without speaking to my  
11 attorney first. You got the scenario?

12 A Got it.

13 Q This happens?

14 A Yes. Often.

15 Q Now, that is -- sometimes that is bad for a defense,  
16 right, you want to find out what that person would say on the  
17 stand, right?

18 A I wouldn't say it's bad for the defense.

19 Q Well, let me ask you this. If a witness says, I want my  
20 lawyer here, do you honor that?

21 A Sure.

22 Q You don't say, Well, I don't care about lawyers, I'm  
23 going to interview you anyway?

24 A A lawyer would be violating the ethical rules to do that.

25 Q How about if, I'm not going to try to talk to you, but



Ricco - cross/Fodeman

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1 let me send someone else to talk to you behind your lawyer's  
2 back; can you do that?

3 A You can't do through the back door what you're not  
4 allowed to do through the front door.

5 Q So you can't use a defendant's criminal associates, for  
6 example, to go down and talk to this witness who has said to  
7 you already that he doesn't want to talk to you without a  
8 lawyer?

9 A You shouldn't send people to do that, but when you  
10 represent people and they are connected, they talk to each  
11 other.

12 Q Fair enough.

13 A And they find out what problems are, and the big  
14 difficulty that we have oftentimes as lawyers is you're  
15 telling people don't do this and they go out and do it anyway.

16 Q I'm talking about what a lawyer would do.

17 A I'm with you.

18 Q A lawyer can't send someone to do that, right?

19 A Once that person is saying, I have a lawyer, that should  
20 be honored in every respect and in any scenario you can come  
21 up by that lawyer, and the lawyer should not be trying to  
22 think of ways of getting around that.

23 The lawyer should honor that and call the lawyer and  
24 sit down and talk to the person with the lawyer. If they're  
25 telling the truth what difference does it make?

Ricco - cross/Fodeman

1161

1 Q Exactly. There are occasions aren't there where  
2 witnesses are willing to speak with you --

3 A Yes.

4 Q -- pretrial, right? You've had that happen frequently,  
5 correct?

6 A Sure.

7 Q And sometimes they come down to your office and talk to  
8 you; is that fair to say?

9 A And often times the lawyer will go out -- usually most  
10 times lawyers will go out and meet people in the environment  
11 that they are comfortable with.

12 Q Right, because they are more likely to be forthcoming if  
13 they are comfortable, fair to say?

14 A Right.

15 Q The game plan --

16 A You want people to be comfortable, right.

17 Q And when you do that, Mr. Ricco, when you go out and  
18 interview people, is it fair to say that it's preferable to do  
19 that with an investigator?

20 A The preference is yes. You know, there are obvious  
21 reasons for that.

22 Q Let's talk about investigators. Defendants have the  
23 right to hire as many investigators as they want; is that  
24 correct?

25 A Correct. And if they are not able to hire investigators,

Ricco - cross/Fodeman

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1 this court will provide the defendant, if he's eligible for  
2 whatever services that defendant would need to prepare for the  
3 case, including an investigator.

4 Q And there are licensed investigators obviously here in  
5 New York City and throughout the country, fair to say?

6 A That's right.

7 Q And the reason why you said the preference is to have an  
8 investigator -- explain that, why don't you explain it, why is  
9 it better not to go out by yourself?

10 A Because people change their story. You meet with people  
11 and they tell you one thing and then later on they get on the  
12 witness stand and say, I never said that, I don't know who you  
13 are, I never even met you. And so you have -- you try to have  
14 an independent person there, hopefully somebody with some  
15 credibility, who can impeach that person's change of  
16 testimony.

17 Q Let's play that out so we see how it works.

18 A All right.

19 Q The witness comes in to Anthony Ricco's office and says,  
20 Yeah, I was there and your client didn't do it. Okay?

21 A Yes.

22 Q Got me so far?

23 A Yes, I'm with you.

24 Q You got a licensed investigator seated right next to you  
25 at your desk, right, taking copious notes, okay. Then the

Ricco - cross/Fodeman

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1 witness gets on the stand, he's called by the government, and  
2 the guy says, Your client did do it. I was right there, I saw  
3 it with my own eyes, to take the easy example.

4 A Correct.

5 Q At that point you would be permitted to call your  
6 investigator to the stand and talk about the earlier meeting,  
7 fair to say?

8 A Yes.

9 Q That's the reason, the very reason why, among others,  
10 that you would have an investigator present for such a  
11 meeting?

12 A That's correct.

13 Q Because you as the lawyer -- just to drive it home -- you  
14 as the lawyer couldn't then get on the stand and say, Well,  
15 wait a minute, ladies and gentlemen of the jury, I was there  
16 and this person said something else. You can't be a witness  
17 and a lawyer, right?

18 A The lawyer should never be an unsworn witness in front of  
19 the jury.

20 Q Now, you've been -- you've participated in preparing  
21 witnesses for their testimony, is that fair to say?

22 A Yes.

23 Q You've probably put on -- I don't know -- dozens and  
24 dozens and dozens of witnesses throughout your career?

25 A I have.

Ricco - cross/Fodeman

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1 Q And it is an obligation of attorneys, both prosecution  
2 and defense, to prepare their witnesses prior to trial; is  
3 that correct?

4 A That's correct.

5 Q Go through the questions that would be requested at trial  
6 and understand what the answers the witness may give at trial;  
7 that's something that they should be doing, correct?

8 A That's right.

9 Q Here and there?

10 A That's right.

11 Q Now, are you permitted as a lawyer to script, to write  
12 out, to give a witness what you want them to say?

13 A That's a difficult question. If you ask it different --

14 Q Let me ask you this --

15 A What are you driving at?

16 Q Maybe it's not a great question. Let me put it more  
17 plainly.

18 A witness comes in and says, Look, I didn't see  
19 anything but I'd be willing to say whatever you want. Can you  
20 then say, Well, that's great. Let me write out what I'd like  
21 you to say, can you say this? Can you do that?

22 A No. It's suborning perjury, participating in perjury.

23 Q You can't do that. While we're on the topic of that, if  
24 a witness comes in and says, I work at Burger King, can you  
25 say to that witness, Well, I don't think the jury is going to

Ricco - cross/Fodeman

1165

1 I like that, tell them you work at McDonald's; can you do that?

2 A That's a difficult question.

3 Q Explain, why is that a difficult question. That is not  
4 true, right, the McDonald thing is not true?

5 A I don't think it's going to matter to a jury whether a  
6 person works at Burger King or McDonald's.

7 Q Fair enough. Exactly. Sorry, I cut you off.

8 A No. If you're asking me should a lawyer be asking a  
9 witness to commit perjury, the answer is no. The answer is  
10 no -- not that they shouldn't be doing it, a lawyer is not  
11 allowed to do it.

12 Q And so if a witness comes in and says, I'm a drug dealer,  
13 you can't tell him to say, You're not a drug dealer, say you  
14 have a real job?

15 A Well, I've heard that before. .

16 THE COURT: I didn't understand that answer. What?

17 Q Why don't you explain what you mean by that?

18 A Because there are different ways that a lawyer can handle  
19 that situation. If the bottom line is that the lawyer should  
20 not suborn perjury, the lawyer may say to the person, Well,  
21 listen, if they ask you about it tell them. But that's close,  
22 that's dangerous and a lawyer shouldn't do that because a  
23 witness should be forthcoming.

24 But both sides, both the government and defense  
25 lawyers, often tell witnesses, You know, leave that for

Ricco - cross/Fodeman

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1 cross-examination or bring it up this way or that way. Each  
2 side loves to have the advantage of "I got you or surprise,"  
3 but the bottom line is that no one should be asking a witness  
4 to testify falsely to mislead the jury or to give the jury an  
5 impression of one thing when in fact something else exists.  
6 That should never be done by a lawyer.

7 Q Fair enough.

8 Now, there are occasions where you become aware of a  
9 witness who, if that person were to testify, it would be  
10 damaging to your client's position at trial; fair enough?

11 A Yes. Happens often.

12 Q You come to learn that the government is aware of a  
13 cooperating witness, that the cooperating witness is an  
14 eyewitness to a violent crime, and you think that that person  
15 could be damaging to your -- to the defense case -- fair  
16 enough?

17 A Yes.

18 Q Now, can you, as a lawyer, go to that person and attempt  
19 to convince them not to testify, absent themselves from court,  
20 don't come to court?

21 A Never.

22 Q Can't do it?

23 A No.

24 Q Can't --

25 A You mean actively go out and like encourage someone,

Ricco - cross/Fodeman

1167

1 Look, you know, here's two tickets go to Miami, go away?

2 Q No?

3 A No.

4 Q Can't do it.

5 Now, as part of being a defense attorney --

6 A And the reason --

7 Q Go ahead.

8 A -- is because you should not be actively involved in  
9 hiding information. But there's a flip side to that. The  
10 flip side to that is that the lawyer has a different  
11 obligation to disclose information when it comes from a source  
12 other than his client and so --

13 Q Right.

14 A -- and so, you know --

15 Q Well, let me make sure I understand the point.

16 A All right.

17 Q You can't tell a -- am I correct in saying, you cannot  
18 tell a witness, even if you think that person could hurt your  
19 client, you can't tell that witness, Look, don't testify,  
20 don't do it, be in Miami the week of the 27 of July; can you  
21 do that?

22 A I don't think that a lawyer is in a dangerous area for  
23 telling a witness he doesn't want them to testify, he's not  
24 going to call them and if it was up to me I would prefer you  
25 not to come to court.



Ricco - cross/Fodeman

1168

1 Q How about paying a witness to not come to court?

2 A No way.

3 Q No way. How about paying someone's parents to convince  
4 their child not to testify in court?

5 A No.

6 Q Let's talk a little bit about fees. You are a private  
7 defense attorney; correct?

8 A Yes.

9 Q Sometimes you represent indigent clients in your  
10 practice; is that right?

11 A Yes.

12 Q And in those cases your fees come from the court?

13 A Yes.

14 Q Is that correct?

15 A Yes.

16 Q And then there are other occasions in your practice, and  
17 in many criminal defense attorneys throughout the city and  
18 country, where their fees are paid by the client?

19 A Yes.

20 Q Or their client's loved ones, relatives?

21 A Yes.

22 Q Now, in your firm, Mr. Ricco, how many lawyers do you  
23 have?

24 A Myself and an associate.

25 Q And are there any other staff members who work for you?

Ri cco - cross/Fodeman

1169

1 A Yes.

2 Q About how many?

3 A A few people work in the office. They work for myself  
4 and other lawyers.

5 Q Now, have you had occasion where there have been cases  
6 that are big cases where the case sort of becomes a big part  
7 of your practice, day-to-day practice?

8 A Yes, often.

9 Q Has that happened?

10 A Often.

11 Q Sometimes a case can become so big it's almost all  
12 consuming; is that fair to say?

13 A That's fair to say.

14 Q Each and every person in the office is either working on  
15 it full time or devoting a substantial portion of their time  
16 to that single case?

17 A That happens.

18 Q Like death penalty cases; fair to say?

19 A Yes.

20 Q Complicated racketeering cases?

21 A That happens often.

22 Q Terrorism, complicated terrorism investigations and  
23 trials?

24 A Yes.

25 Q These really can consume a small office like yourself?

Ricco - cross/Fodeman

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1 A Yes.

2 Q There are other law offices where there are hundreds of  
3 lawyers, but in the kinds of firms we're talking about, like  
4 yourself, that can become all-consuming, correct?

5 A Can be.

6 Q In those situations, a large percentage of your fees that  
7 you're generating are being generated as a result of that  
8 case; fair to say?

9 A Sometimes.

10 Q Could happen?

11 A Could happen.

12 Q Now, the fee issue, is it fair to say -- I don't want to  
13 delve into your personal finances --

14 A All right.

15 Q Let's talk in generalities. Fees to attorneys should be  
16 paid in advance, is that fair to say?

17 A The ethical rules prevent us -- defense lawyers from  
18 getting contingency fees.

19 Q Let's talk about what that means. Explain what that  
20 means.

21 A Because the fee shouldn't be based on the outcome of a  
22 trial.

23 Q And so there are certain kinds of cases, maybe accident  
24 cases, slip and falls, things like that, where there is a  
25 contingency fees?

Ricco - cross/Fodeman

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1 A Yes. Those cases don't involve the loss of liberty.

2 Q So in criminal cases the idea is, here's the fee and you  
3 can't promise a result; fair enough?

4 A Right. The purpose of the rule is so that you don't have  
5 like competing interests at the time the trial is on.

6 Q Explain what you mean by that.

7 A Interest of the lawyer to get paid versus the interest of  
8 the client to have zealous representation.

9 Q So it's certainly advisable for that very reason to get  
10 paid before the trial starts?

11 A It's advisable. Rarely happens, but it's advisable.

12 Q And one of the problems that I'm sure you've experienced  
13 is that after a client is convicted, should that happen, it is  
14 more difficult to collect those fees; is that fair to say?

15 A That's true. It happens that you do, but that's rare and  
16 those are very rare individuals. Some people do.

17 Q If a person loses the case, if a client loses, it will be  
18 harder to track down those fees, they are going to be less  
19 likely to want to pay it?

20 A That's the common experience of most lawyers.

21 Q And so that's why you make every effort to get paid in  
22 advance?

23 A No.

24 Q Among other reasons?

25 A No. I ask that the clients pay in advance because our

Ricco - cross/Fodeman

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1 ethical obligation is for that to happen.

2 Q Now, also, during the course of representing someone, a  
3 lawyer can incur significant amount -- let me withdraw that.

4 When you're representing someone, fees are incurred,  
5 costs are incurred in connection with that representation? Do  
6 you know what I'm getting at?

7 A Yes.

8 Q For example, if you retain the services of a private  
9 investigator, that costs money?

10 A Yes.

11 Q Thousands of dollars, potentially?

12 A Yes.

13 Q You hire experts, there's an obligation for the use of  
14 experts; that costs money, correct?

15 A Yes.

16 Q You want a handwriting expert -- money?

17 A Most experts require a fee.

18 Q Transcripts from prior proceedings, the court  
19 stenographer has to get paid, right?

20 A Yes.

21 Q And those fees, those costs are ultimately the  
22 responsibility of the client; is that correct?

23 A Yes.

24 Q And if the client isn't paying, who does it fall on?

25 A Well, in reality it becomes a bad debt, but I can tell

Ricco - cross/Fodeman

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1 you that there are many lawyers who are in that situation,  
2 they will end up -- this lawyer in particular, I will always  
3 pay the costs of the printing of the briefs.

4 I never walk away from a contractual obligation if a  
5 client decides to do it because of the relationship you have  
6 with the court reporters, printers, the vendors that you deal  
7 with. They shouldn't suffer because you exercised poor  
8 judgment in your billing practices so you see to it that they  
9 get paid -- you should anyway.

10 Q We started off this examination talking about the  
11 differences in handling cases with violence versus white  
12 collar cases?

13 A Right.

14 Q And one of the reasons -- some of the things that we  
15 focused on was the nature of the client's criminal associates.  
16 Remember that line?

17 A Generally.

18 Q Generally speaking.

19 A Yes.

20 Q And you've done organized crime cases -- we went through  
21 all this -- right?

22 A Yes.

23 Q And part of that is understanding the dangers associated  
24 with dealing with these kinds of people; fair enough?

25 A Fair enough.

Ricco - cross/Fodeman

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1 Q And, in fact, when you sit down with an individual who is  
2 an associate of a client who has been accused of crimes of  
3 violence, that's something that you need to understand when  
4 you go into that interview?

5 A I think the more life experience you have and the closer  
6 your life experiences are to the people that you're talking  
7 with the easier it is to get to talking about a case.

8 Let me just say this --

9 Q Go ahead.

10 A -- that oftentimes the conversations that you have with  
11 people in these jails, you wouldn't want to talk about them in  
12 church on Sunday because they are raw, they are violent;  
13 people tell you things sometimes you prefer not to hear, but  
14 you ask them, they tell you.

15 But the flip side of it is, in terms of you as the  
16 lawyer, your representation should be to conduct your  
17 investigation and the work that you do in such a way that you  
18 could talk about it in church on Sunday. So you have that  
19 pull, constant pull going on.

20 Q When you talk to -- you have had occasion to talk to  
21 associates of clients who you know are criminals, fair to say?

22 A Yes, sir.

23 Q You know they are members of organized crime, you know  
24 they are members of terrorist organizations; essentially, you  
25 know that they are involved in drug gangs, fair to say?

Ricco - cross/Fodeman

1175

1 A Yes.

2 Q Would you ever use such a person to be a private  
3 investigator for you?

4 A Yes.

5 Q You would send that person out to get information for  
6 you?

7 A Send out. But certainly, I recall working on a case with  
8 Mr. Brownell once and we utilized a person in the neighborhood  
9 to give us information about some of the activities that took  
10 place at the boys club.

11 That person wasn't sent out to do anything, but that  
12 person provided information that became very valuable, that an  
13 investigator went out and did some follow-up work on it.

14 Q Just to draw the distinction here --

15 A But it depends. I mean --

16 THE COURT: Hold on one second.

17 THE WITNESS: I'm sorry, Judge.

18 THE COURT: Go ahead. You were asking a question.

19 MR. FODEMAN: If Mr. Ricco wants to explain it.

20 THE WITNESS: I'm sorry, Judge.

21 THE COURT: Go ahead.

22 THE WITNESS: It depends. I would tell you that it  
23 is rare, because it has a lot of difficulty, but there have  
24 been -- particularly, I can think of capital cases where you  
25 have asked a community person to contact someone who's been



Ricco - cross/Fodeman

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1 avoiding you. But it's very risky because you, you risk the  
2 interaction between that person and the person that you  
3 ultimately want to speak to and so that, you know, you want to  
4 make sure that that is a proper interaction.

5 Q How about using one witness that you're going to call to  
6 find other witnesses and communicate with them, is that  
7 advisable?

8 A It happens. It's not advisable. It has a lot of  
9 dangers. But people do it, but it's not advisable.

10 Q Now, you said you've gone to jails on numerous occasions;  
11 correct?

12 A Many jails.

13 Q Many of your clients are incarcerated pretrial, fair to  
14 say?

15 A Yes.

16 Q And you understand that there are rules in place at those  
17 facilities for security reasons?

18 A Yes.

19 Q And you're cognizant of those rules when you go and visit  
20 clients or witnesses or anyone else who is incarcerated;  
21 correct?

22 A Yes. And also many of the training programs we put on --  
23 when I say "we" I mean the Bar Association, Criminal Bar  
24 Association and other Bar Associations, is to advise lawyers  
25 of those rules.

Ricco - cross/Fodeman

1177

1 Q Some of those rules -- I mean, you understand this, some  
2 of those rules are put in place for the very reason that jails  
3 are dangerous places; fair enough?

4 A Yes.

5 Q They house dangerous people; fair to say?

6 A Yes.

7 Q You've heard of situations where messages have been sent  
8 out from jails where people on the outside have been harmed,  
9 you have heard of such cases?

10 A I know of such situations. Every institution that's  
11 governed by the Bureau of Prisons precludes lawyers from  
12 taking information out of a jail.

13 Of course, you could take out what somebody tells  
14 you but that's it. Nor are you allowed to bring anything in.  
15 It's determined contraband.

16 Q You sort of guessed my next question. Let me move onto  
17 the next one.

18 A client says to you, Mr. Ricco, I'd like you to  
19 take this letter and send it to my criminal associate. Can  
20 you please bring it to your office and mail it or scan it  
21 or -- you're shaking your head. No way?

22 A Won't happen.

23 Q Won't happen. Won't do it?

24 A No. But people do it.

25 Q And you understand that that is something that should not

Ricco - cross/Fodeman

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1 be done?

2 A It's a violation of the rules of the Bureau of Prisons.  
3 That person could be banned from the facility, and it's also a  
4 misdemeanor.

5 Q In fact, you told people who work with you, you warned  
6 them about this very rule, correct?

7 A I have.

8 Q Right?

9 A Right.

10 Q You've brought in interpreters, for example, to talk to  
11 clients. Do you tell them about this rule?

12 A Yes. Because as I told you, the people we go in and see  
13 in jail are very manipulative so you go in with an  
14 interpreter, and when you get up to go get some water, the  
15 person is telling the interpreter in Spanish or foreign  
16 language getting them to do something for them that you don't  
17 want to be done.

18 So what we found is not only do you have to tell  
19 your staff about what the rules are, but you also have to talk  
20 to the interpreters and other experts who don't go in  
21 regularly about what the rules are, because the people that  
22 are in the jails are constantly looking for an angle all the  
23 time. They don't realize that half the angles that they're  
24 looking for at the end always backfire.

25 Q Have you ever had occasion where -- I guess by the nature

Ricco - cross/Fodeman

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1 of your job, you have to talk about acts of violence with  
2 witnesses -- I mean, a lot of your cases involve acts of  
3 violence, fair to say?

4 A Yes.

5 Q If a witness says to you, I'd like to commit an act of  
6 violence against someone because I think it will help your  
7 client, how does Tony Ricco react to that?

8 A Well, okay, the answer is that you would dissuade  
9 somebody from doing that. But it depends on circumstances. I  
10 can't -- I'm sitting here thinking to myself like under what  
11 circumstance would something like that come up.

12 Q Let me give you one. I'll help.

13 A Go ahead.

14 Q A witness comes in and says, I understand that witness X  
15 is going to be cooperating for the government and is going to  
16 be testifying against your client. I think that if we kill  
17 one of his relatives that will convince him not to cooperate.

18 A Okay, I got you.

19 Q Isn't that a great idea, Mr. Ricco? And Mr. Ricco's  
20 response is?

21 A You know, my response is very simple. My instincts as a  
22 young lawyer told me when somebody tried to extort, engage in  
23 extortion, the steps to follow.

24 If I thought and have proof that somebody was going  
25 to be involved in a murder, there would be steps that would be

Ricco - cross/Fodeman

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1 followed. People saying it, it depends. A lot of people say  
2 a lot of things.

3 You know, it depends on their interaction with me,  
4 because people are trying to test you. Are you trying to get  
5 me to speak? Are you trying to get a rise out of me? Are you  
6 trying to see where I'm coming from?

7 You know, if I thought it was real, I would act on  
8 it. If I thought it was nonsense I would treat it as  
9 nonsense.

10 Q Would you alert the authorities?

11 A That would be one of the steps that I would consider  
12 taking.

13 THE COURT: How much more do you have?

14 MR. FODEMAN: Another ten minutes, Judge.

15 THE COURT: Let's take our break. Don't discuss the  
16 case. We'll resume in 10 minutes. All rise.

17 (Jury leaves.)

18 THE COURT: Ten minutes.

19 (Recess.)

20 (Open court.)

21 THE COURT: Mr. Ricco, step up, please.

22 (Jury present.)

23 THE COURT: Please be seated.

24 Mr. Fodeman.

25 MR. FODEMAN: Thank you, your Honor.

Ricco - cross/Fodeman

1181

1 BY MR. FODEMAN:

2 Q I have a couple more questions.

3 Mr. Ricco, are you familiar with a term "witness  
4 fee"?

5 A Yes.

6 Q And a witness fee is something that a defense attorney  
7 can pay a witness to be a witness; is that correct?

8 A No.

9 Q What's your understanding of a witness fee?

10 A Well, the ethical rules set forth payments to witnesses  
11 because one has to be careful that one is not paying for  
12 testimony. So the ethical rules talk about you can pay for a  
13 lay witness, you can pay their transportation to and from  
14 court.

15 There's a witness fee that's associated with a  
16 subpoena that's issued by the court, I think it's 40 dollars a  
17 day. The only witness that could be paid a fee is an expert  
18 witness, and the ethical rules discuss that.

19 Q And by a lay witness, you mean a witness who is not an  
20 expert?

21 A I'm sorry, a witness who is not an expert. Somebody who  
22 is an eyewitness to some fact or circumstance.

23 Q If you want an eyewitness who lives here in Queens to  
24 testify in this courthouse, you could pay for car service?

25 A That's right.

Ri cco - cross/Fodeman

1182

1 Q Pay for subway?

2 A Ri ght. Lunch.

3 Q Lunch, maybe?

4 A Ri ght.

5 Q Ten thousand dollars in cash, would you pay 10 thousand  
6 dollars in cash for that?

7 MR. SHARGEL: I object to that.

8 THE COURT: Overruled.

9 Q Would you pay 10 thousand dollars to testi fy?

10 A To take a subway from Queens to this courthouse, no.

11 Q And just one last question. The last question is this,  
12 sir: As a lawyer, would you ever tell someone or authorize  
13 someone to commit an act of violence against a prospective  
14 witness?

15 A No.

16 Q Even if that witness would hurt your client if he  
17 testified?

18 A Correct. When I say never, what I mean is that a lawyer  
19 should never do that. A lawyer has no professional obligation  
20 to do such a thing and a lawyer would be precluded from doing  
21 something like that.

22 MR. FODEMAN: Nothing further. Thank you.

23 THE COURT: Mr. Solano.

24 MR. SOLANO: Thank you, your Honor.

25

Ri cco - cross/Sol ano

1183

1 CROSS-EXAMI NATION

2 BY MR. SOLANO:

3 Q How are you doing, Mr. Ri cco?

4 A I'm okay, Mr. Sol ano. How are you?

5 Q You testified that you know the people here at the  
6 prosecution table?

7 A Yes, Steve D'Al essandro --

8 Q You left me out, right, on the defense side?

9 A I'm fami liar with every lawyer seated in this courtroom  
10 except for the young lady who is a defendant, and I am also  
11 fami liar with this court. I practice here for many years.

12 THE COURT: Get down to the testimony.

13 THE WITNESS: Sorry.

14 Q Mr. Ri cco, you testified during both cross-exami nation --  
15 direct and cross-exami nation about the role of a criminal  
16 defense attorney, correct?

17 A Yes.

18 Q You also testified that you yoursel f have an associate in  
19 your fi rm, right?

20 A That's correct.

21 Q Can you describe to the members of the jury the  
22 di fferences between the role of a criminal defense attorney --  
23 by that I mean the lead attorney -- and the role of the  
24 associate, from your experience?

25 A Well, that's a very complicated question, and that has a



Ricco - cross/Solano

1184

1 lot to do with who the lead lawyer is and his relationship  
2 with his associates and the skill level and experience level  
3 of the associate.

4 The more skilled level, the greater the skill level,  
5 the greater that lawyer's experience, you would naturally give  
6 them more work to do because they can handle it.

7 The less skill they have, if they are not as  
8 experienced, you naturally would not give them as much work to  
9 do. They may not be -- I say may not be as closely involved,  
10 it all depends.

11 Now, I say that as a lawyer, but there are -- you  
12 know, there are situations that are different, but that's  
13 generally the nature of that relationship.

14 Q Just to sort of recap. The younger the attorney, and the  
15 less experienced the attorney, the less complicated work you  
16 or some other criminal defense attorney might give, correct?

17 A That's generally -- that's generally very, very true.

18 Q And -- I'm sorry.

19 A In terms of, you know, you have associates work on a very  
20 small part of the case. Sometimes they are very actively  
21 involved in a case, but for the most part you will give them  
22 assignments to go out and do, go pick something up, go visit  
23 the client, find out certain piece of information. But the  
24 lead lawyer usually handles the bulk of the responsibility for  
25 the case.

Ricco - cross/Solano

1185

1 Q And in the event where you had an attorney, a young  
2 associate, some of the things that you would possibly have the  
3 associate do are like look up information in certain public  
4 records, right, that's one of the things you might have them  
5 do?

6 A That's one of the things they would do. The associate  
7 that I work with who is here in the courtroom does that all  
8 the time.

9 Q And provide, for example, some information to some  
10 investigators that might be working on the case, right?

11 A That's something that an associate would do.

12 Q And as you said, if the associate has more skill, that  
13 associate, and more experience, that associate might be doing  
14 some other more complicated matters, for example, like writing  
15 or drafting motions, right?

16 A That's correct. I think, and I'm very conscious of it in  
17 my work as a lawyer, that we don't overburden young lawyers.  
18 There's a very important relationship between the lawyers at  
19 the bar and young lawyers, that they are shown how to do  
20 things the correct way and that you don't give them too much.

21 Their careers are ahead of them and you want to be  
22 careful and make sure that they are taking steps to allow  
23 their career to develop and blossom.

24 Q And in your experience, Mr. Ricco, have you ever had an  
25 occasion or heard of the occasion where sometimes motions need

Ricco - cross/Solano

1186

1 to be done where you might bring into the case sort of outside  
2 counsel, attorneys that are more specialized in certain areas?

3 A It is rare for me to do it because I do -- and my  
4 associate, Steven Legon -- we do a fair share of most of our  
5 writing, but it is not uncommon for many lawyers to bring in  
6 an expert on Title III, on wiretaps or some area of law that  
7 the lawyer is not as proficient on and really wants to do a  
8 terrific job, so they'll bring in another lawyer to do the  
9 motions or to work on a part of the brief or to just deal with  
10 a particular issue. That's not uncommon. That happens often.

11 Q Now, in your experience, Mr. Ricco, and possibly from  
12 dealing with other attorneys, does the lead attorney tell the  
13 associate every single thing that that lead attorney is  
14 thinking about in terms of the strategy of their case?

15 MR. SHARGEL: Objection.

16 THE COURT: Sustained. Come up.

17 (Continued next page.)  
18  
19  
20  
21  
22  
23  
24  
25

Ricco - cross/Solano

1187

1 (Sidebar.)

2 THE COURT: What's your objection?

3 MR. FODEMAN: Outside the scope of this witness'  
4 expert ability to testify and outside the -- that's the gist  
5 of it.

6 MR. SOLANO: He's talking about what interaction he  
7 has with investigators, talking about interactions with other  
8 lawyers.

9 I think it's fair game in this kind of case to ask  
10 what his experience is with associates and what information is  
11 imparted to that associate, and to explain the differences  
12 between the roles of a lead attorney who is involved with  
13 strategy, decision making, and an associate.

14 THE COURT: I agree with the government. He's  
15 testified that this depends on the relationship between a  
16 particular partner and a particular associate.

17 I think it's outside the bounds of why he's here.  
18 I'm going to sustain the objection and ask you to move off the  
19 topic.

20 MR. SOLANO: All right.

21 (Continued next page.)

22

23

24

25

Ricco - cross/Solano

1188

1 (Open open.)

2 BY MR. SOLANO:

3 Q Now, Mr. Ricco, you also talked about -- I think your  
4 words were going to visit a client is every defense  
5 attorney's, the bane of their existence. Can you explain what  
6 you meant by that?

7 A Yes. While it's very important that the lawyer spend  
8 time with the client, a lot of the time is wasted time. A lot  
9 of it is time spent discussing things that at the end of the  
10 day have nothing to do with the case, but you're obligated to  
11 go and you have to go, and you got to go through the security  
12 and you wait an hour and a half, two hours to see a person for  
13 fifteen minutes and you have to do it. There's no way around  
14 it. You know, it's a part of being a lawyer.

15 I used the term the "bane of our existence," maybe I  
16 shouldn't have said it that way, but it is very difficult and  
17 oftentimes the clients are very demanding and they want to see  
18 the lawyers. But you spend an awful lot of time waiting in  
19 the jails that you could be working elsewhere, which is why  
20 oftentimes young associates are sent to jail to talk to  
21 clients, just pretty much to keep things stable while a case  
22 moves forward.

23 Q Now, in terms of, you testified about associates possibly  
24 going to the jails to visit the client, and Mr. Fodeman asked  
25 you about taking out some materials that the inmate might give

Ricco - cross/Solano

1189

1 you. There's nothing wrong with taking out materials that are  
2 legal materials; correct?

3 A Well, I'm sorry, but most lawyers don't understand that  
4 when they say nothing, they mean nothing. And there's always  
5 problems with this because -- because though the rule is  
6 clear, there's always problems at the jails with stuff going  
7 in and out because people think all they're doing is taking a  
8 letter or a brief or something, but in actuality, you're not  
9 even supposed to hand your business card across the table with  
10 your name and your phone number on it.

11 Over the years, and in recent years, the Bureau of  
12 Prisons has been cracking down on it because there have been  
13 so many abuses that have taken place and of course experienced  
14 lawyers are not familiar with the rules if they ask these kind  
15 of questions, and the less experienced lawyers have more  
16 difficulty with those rules. And that has been a common  
17 experience for lawyers that practice here in the Eastern  
18 District and in the Southern District.

19 Q Just one final area. Mr. Fodeman asked you regarding  
20 whether or not you can script out or write out what you want  
21 the prospective witness to testify to, and I believe we all  
22 agree that you can't do that; correct?

23 A Well, I tried to answer his question based on what he  
24 was -- the way he asked the question. I mean, oftentimes  
25 people script out a direct examination, they script out a

Ricco - cross/Solano

1190

1 cross-examination.

2 A lot of people think that folks are just up there  
3 doing it naturally; that's not the case. Oftentimes the  
4 lawyers have worked through the questions on both sides in  
5 preparation, but I took Mr. Fodeman's question to mean should  
6 lawyers be fabricating testimony for people to testify to.  
7 And if that's your question, then the answer is no, they  
8 should not.

9 Q But there is absolutely nothing wrong with possibly  
10 providing a witness with the areas of testimony, not what to  
11 say exactly, but, for example, I might ask you about your  
12 education, right, not giving you the actual words -- there's  
13 nothing wrong about asking about areas, right, writing that  
14 down?

15 A There's nothing wrong with areas and there's nothing  
16 wrong with half the talk that you have in jails because all of  
17 that is just talk.

18 The question becomes what happens when you cross the  
19 line between talk and what you ultimately are going to present  
20 in a courtroom. And so there's nothing wrong with talking to  
21 the potential defendant or potential witness about anything.

22 You end up talking to people about, Oh, you heard  
23 about this murder, that murder, and you're talking about what  
24 happened ten years ago and talking about the coke deals they  
25 did and didn't do, and how they spent their money in Puerto

Ri cco - redi rect/Shargel

1191

1 Ri cco and prosti tutes, you end up talking about all of thi s  
2 stuff and, God forbid, if those conversations with ever  
3 recorded, you coul dn't expl ain what you're doing talking about  
4 thi s stuff.

5 But ul timately, the bottom line look is what the  
6 lawyer ul timately decides is going to be presented in the  
7 courtroom and that investigation and what that lawyer presents  
8 in the courtroom has to be within the bounds of the law, it's  
9 what the court expects of the lawyers for both the prosecution  
10 and the defense.

11 MR. SOLANO: Thank you, Mr. Ri cco.

12 THE COURT: Thank you, Mr. Sol ano.

13 Is there redi rect?

14 MR. SHARGEL: Just a li ttle bi t.

15 REDI RECT EXAMI NATION

16 BY MR. SHARGEL:

17 Q Mr. Ri cco, there has been a lot of di scussions thi s  
18 morn ing about rules, rules of law and canons of ethics.

19 A Yes.

20 Q And I have thi s question for you. Wi thi n the rule of  
21 law -- you just said moment ago there's a lot of talk. Wi thi n  
22 the rules of law, do the rules provide certain di scretion to a  
23 defense lawyer?

24 A Yes, it does.

25 Q And coul d you expl ain how that di scretion works.



Ricco - redirect/Shargel

1192

1 A Yes. There's no bright line rule as to how a lawyer  
2 should go about conducting an investigation, it's just the  
3 outside parameters.

4 Ultimately, the lawyer has discretion based on their  
5 skill, their experience, their background and training to go  
6 about trying to find the information in a way in which they  
7 think will be effective. Ultimately that lawyer has to decide  
8 what will do -- not the talk, but what will actually happen in  
9 the case.

10 I shared with the jury and the court the situation  
11 involving myself when I was in Trenton State Prison. When  
12 that guy wrote that bribe on a piece of paper, there was  
13 nothing else to do about that. I'm uncertain as to what I  
14 would have done had he just said it to me. I might have  
15 wanted to talk to some -- at that time, some more experienced  
16 lawyers to find out what would be the best thing to do, but it  
17 was so obvious and so -- it was a conclusion, it was a bribe.  
18 He wrote it down. I wanted the bureau to get that pad as fast  
19 as possible.

20 Q Now, in a case -- and you were asked questions about this  
21 on cross-examination -- in a case involving organized crime or  
22 drug gang or violent gangs, that is what I'd like to focus  
23 your attention on --

24 A Okay.

25 Q -- is there anything in the rules that lawyers practice

Ricco - redirect/Shargel

1193

1 law by that says in a case like that you don't do an  
2 investigation?

3 A No. It's just the opposite. The United States Supreme  
4 Court has said repeatedly that lawyers must investigate cases.  
5 If you don't investigate a case you are treading on what is  
6 ineffective assistance of counsel.

7 The failure to investigate is not per se ineffective  
8 assistance of counsel but a lawyer would have to explain why  
9 he didn't conduct any investigation on behalf of the  
10 investigation that was provided to him or her by the client.

11 We're talking about what happens when you have the  
12 conclusions, but you don't start with the conclusions. You  
13 listen to what people say and then you spend time, effort and  
14 energy to flesh it out. You never know what you're going to  
15 get out of this stuff. Sometimes you get a lot of junk and  
16 every once in awhile you get something that becomes very  
17 important and valuable to both sides of the case.

18 Q Is it important -- given that answer, is it important to  
19 keep conversations going in an effort to learn more  
20 information?

21 A I think that that's true unless you reached the point  
22 where there's no reason to have any further conversation. I  
23 gave you an example of Trenton State Penitentiary. I know I  
24 wasn't going back there, and I know that there was no need to  
25 have any further conversation at all with that person so there

Ricco - redirect/Shargel

1194

1 was none. But had that person said something to me, there  
2 could have been further conversation.

3 The bureau might have suggested to me, get him back  
4 on the phone. Let's see if we can get him recorded saying  
5 that. There could have been a reason to continue the  
6 conversation if it was just talk. But in that situation,  
7 there was no reason and, in fact, the -- when I say the  
8 bureau, the FBI had requested that I go back to Trenton State  
9 Prison and go into a room with Richard Kuklinski and wear a  
10 wire, and I told them that wasn't going to happen. So there  
11 is often a need for future work, but there's a judgment call  
12 as to whether or not you're satisfied that that's it, I don't  
13 need anymore.

14 Q Then on cross-examination you were asked that a lawyer  
15 speaks to cooperating witnesses if possible; correct?

16 A Yes.

17 Q When you say if possible, it depends on the willingness  
18 of the cooperating witness to speak to you; correct?

19 A The right is the witness' right to decline.

20 Q And the right of the lawyer is to ask, correct?

21 A The obligation of the lawyer is to ask.

22 Q It's even a constitutional obligation, isn't it?

23 A Well, yeah, it's a part of a defendant's right to  
24 participate in the compulsory process. How do you know who  
25 you're going to serve a subpoena on unless you talk to people

Ricco - redirect/Shargel

1195

1 and find out who the witnesses are? So it's a part of a  
2 defendant's right to have a lawyer who's out there working  
3 hard for him.

4 Q By the way, when we talk about compulsory process and the  
5 right to subpoena -- this may go without saying -- but the  
6 government has the right to subpoena witnesses here as well,  
7 right?

8 A Yes, they do.

9 Q Both sides have equal opportunity to summon a witness via  
10 subpoena; correct?

11 A Yes. And the court will often ensure that that happens  
12 for both sides.

13 Q Ensure that it happens because whether it's the  
14 government or whether it's the defense, the court can enforce  
15 the subpoena by physically getting someone here using the  
16 Marshal's Service, right?

17 A Yes, sir.

18 Q Now, another question. You were asked about interviewing  
19 a witness who is represented by counsel.

20 A Yes.

21 Q And you are aware, are you not, that in this jurisdiction  
22 that a lawyer may interview a witness --

23 MR. FODEMAN: Objection.

24 THE COURT: Come on up to sidebar.

25 (Continued next page.)

1 (Side bar)

2 THE COURT: I don't know what his objection is.  
3 There being the specter of a no contact rule violation, I  
4 don't want to go back that, citizens protection act --

5 MR. SHARGEL: I wasn't going down that road. I  
6 wanted to clear up what may have been a misapprehension; that  
7 is, I didn't want the jury to be left with the notion once  
8 someone is represented by counsel, you can't approach. In a  
9 matter of minutes there will be testimony about Mr. Simels  
10 going to interview a person in the jail in addition to Khan,  
11 interview, four, five, six times. The person was talking to  
12 them, gave representation, yet represented by a lawyer.

13 THE COURT: If the specter of impropriety because  
14 those people are represented by counsel arises, I'll fix it.  
15 I don't want to go here now with his redirect, there hasn't  
16 been a specter raised of any impropriety.

17 MR. SHARGEL: Mr. Fodeman was suggesting if someone  
18 is represented by counsel --

19 THE COURT: That wasn't my understanding.

20 MR. FODEMAN: Probably too many questions, the  
21 issue was once a person tells you he doesn't want to talk to  
22 you, I have a lawyer, you can't send someone back there.

23 MR. SHARGEL: I'm not sure he's right.

24 MR. FODEMAN: That's what the witness said.

25 MR. SHARGEL: I wanted to clear it up. Judge,

Ri cco-redi rect-Shargel

1197

1 there shoul dn' t be a conviction based on mi sapprehensi on.  
2 There' s plenty in this record, plenty for everyone to talk  
3 about.

4 THE COURT: You can propose an appropriate jury  
5 instruction. I don' t want this on redi rect.

6 MR. SHARGEL: That' s fi ne.

7 (Open court. )

8 CONTINUED REDI RECT EXAMINATION

9 BY MR. SHARGEL:

10 Q Mr. Ri cco, there were questions put about testimony and  
11 conversations about what testimony would be. I would like to  
12 direct your attention to the preparation of affi davi ts based  
13 on your experience.

14 Affi davi ts are not actual affi davi ts until they' re  
15 sworn to; is that correct?

16 A That' s correct.

17 Q Have you ever presented a person with a draft or proposed  
18 affi davi t?

19 A I have never done it, but it is done in the profession.

20 Q Based on your experience in the profession that it' s  
21 done, were the witnesses handed a proposed affi davi t to see if  
22 it' s accurate; is that right?

23 A That' s correct, wi th options, correcti ons.

24 Q Or correcti ons.

25 A Yes.

Ricco-redirect-Shargel

1198

1 Q We've been talking about defendants. We've been talking  
2 about witnesses during the course of your testimony. Are  
3 there people during the course of an investigation -- again,  
4 this is based on your experience -- who are not witnesses in  
5 the sense of observing something but may be sources of  
6 information?

7 A Yes. I was discussing that when Mr. Fodeman was asking  
8 questions. I made a reference to a case that Mr. Brownell and  
9 I worked together on the Lower East Side. There are people, I  
10 use the term witnesses, but really sources of information.

11 Q People with knowledge?

12 A People with knowledge of the neighborhood, the people,  
13 the background, the more insular the community is, you need to  
14 rely on those kinds of people. The government calls them  
15 informants. We call them witnesses, people who know something  
16 about the information relating to the case.

17 Q In the course of your experience, this will really be the  
18 last question, in the course of your experience, have you  
19 worked with communities that were hard to penetrate because  
20 they weren't speaking to outsiders?

21 A Yes, that's true. We see that in a lot of context. We  
22 see that in the context of gang cases. We see it in context  
23 of organized crimes that have direct connections to other  
24 countries, MS 13, see it with those kinds of cases. Those  
25 cases create the more formidable challenges for the defense.

Ri cco-redi rect-Shargel

1199

1 Q How is that?

2 A Just recently I was out at a death penalty training  
3 conference in California discussing with the lawyer his  
4 preparation for a case involving a Mexican defendant. He had  
5 to make a request from the court to not only get helicopter  
6 service but the payment of armed guards to accompany him to a  
7 certain part of Mexico to get information.

8 Oftentimes extraordinary steps are taken to get  
9 information. The tighter the community, the more organized  
10 they are, the more they protect themselves from outside  
11 sources, including you as the lawyer, oftentimes my experience  
12 and most defense lawyers is that you're trying to help people  
13 in spite of themselves. You can't pull a person out of the  
14 water when they're not reaching up for your hand, but most of  
15 the people we represent, they don't trust, certainly don't  
16 trust you even though they hire you. You would think if they  
17 hire you, they would, but it's not the reality. It's a very  
18 difficult process. Again, it's a process that has parameters.

19 Q I'll offer this by way of example. Someone who looks  
20 like me wouldn't do well walking into that little camp in  
21 Mexico or that little town in Mexico?

22 A Or me either.

23 MR. SHARGEL: Thank you, no further questions.

24 THE COURT: Anything further?

25 MR. FODEMAN: No, your Honor.



Si mel s-di rect-Shargel

1200

1 THE COURT: Mr. Sol ano?

2 MR. SOLANO: No.

3 THE COURT: You're excused, Mr. Ri cco.

4 The defense call s Robert Si mel s.

5 R O B E R T S I M E L S ,

6 having been duly sworn/affi rmed, was exami ned  
7 and testi fied as fol lows:

8 THE CLERK: Please state and spell your name for the  
9 record.

10 THE WITNESS: Robert M. Si mel s, S I M E L S.

11 MR. SHARGEL: May I, Judge?

12 THE COURT: Yes.

13 THE WITNESS: You want my addresses?

14 THE COURT: No. Proceed.

15 DI RECT EXAMI NATION

16 BY MR. SHARGEL:

17 Q Mr. Si mel s, do I recognize you as one of the defendants  
18 in thi s case?

19 A Yes.

20 Q Let's start with you telling the jury a little bit about  
21 yoursel f. How old are you?

22 A Sixty-two years of age.

23 Q Where did you grow up?

24 A I was origi nally growi ng up in the Bronx, then moved to  
25 Mt. Vernon, New York, where I spent my formative education,

Simel s-direct-Shargel

1201

1 junior high school and high school.

2 Q Would you tell the jury what military experience you  
3 have.

4 A After graduating from college, it was in the middle of  
5 the Vietnam War. I was a member of the United States air Army  
6 reserve for six years.

7 Q Tell the jury about your educational background?

8 A Graduate of the University of Kentucky, graduate of  
9 New York Law School, graduated from New York Law School in  
10 June of 1974.

11 Q Are you married?

12 A I'm married.

13 Q Children?

14 A Yes, my wife Evelyn is here in court. I have a stepson  
15 who is 23. My daughter is 15. My son is 7, will be 8 next  
16 month.

17 Q Did there come a time you were admitted to practice law?

18 A There was. I was admitted initially to practice law in  
19 December of 1974 in the State of New Jersey. At the same time  
20 I was admitted in March of 1975 in the State of New York.

21 Q Have you been admitted to practice in the State of New  
22 York ever since that point of admission?

23 A I've been admitted to practice in New York since that  
24 time and elsewhere.

25 Q What was your first job in the legal field?

Simel s-direct-Shargel

1202

1 A My first job in the legal field, while I was going to law  
2 school. I worked in what's called the Manhattan District  
3 Attorney's office at that time, run by Frank Hogan, who was  
4 the district attorney. I served there for almost a year and a  
5 half, what we call a trial preparation assistant, which meant  
6 I was assisting the actual prosecutors in the office to  
7 prepare cases for trial.

8 Q Is this while you're going to law school at night?

9 A It was.

10 Q Upon graduation from law school, admission to the bar,  
11 where did you work?

12 A After graduation from law school, I took a job with what  
13 was called the New York State Special Prosecutor for the  
14 Investigation of Corruption in the criminal justice system.  
15 We investigated police, corrections, judges, lawyers and  
16 prosecutors in the New York City criminal justice system.

17 Q How long did you have that job?

18 A I was there from August of 1974 until October 1st, 1979.

19 Q During the time that you were there, how large a case  
20 load, give us an idea how large a case load did you have?

21 A We had very select cases. I had very select cases. I  
22 investigated and prosecuted many police officials from the  
23 police commissioner of the City of New York at that time on  
24 down. I prosecuted and convicted a judge at that time, but  
25 they were select cases. I investigated the rebuilding of

Simel s-direct-Shargel

1203

1 Yankee Stadium, giving away the Bronx terminal market to a  
2 particular developer, things as that.

3 Q Have you ever involved yourself in any teaching?

4 A I have. I have been associated with the NITA program  
5 that goes on at Hofstra Law School twice a year, doing it for  
6 17 years, lectured at various what they call CLE or continuing  
7 legal education programs for lawyers. I've lectured for the  
8 Practicing Law Institute, another type of practice here in the  
9 City of New York.

10 Q Any of your writings have been published?

11 A Yes, I've written. I was fortunate enough to be selected  
12 of one of about 12 or 14 of the top cross-examiners in the  
13 United States, given an opportunity to write a chapter in a  
14 book called The Art of Cross-Examination.

15 Q After your tenure as a prosecutor in the Office of the  
16 Special Prosecutor, did you enter the private practice of law?

17 A I did.

18 Q When was that?

19 A October 1st, 1979.

20 Q Have you been in private practice ever since then?

21 A I have.

22 Q Could you tell the jury the types of cases that you  
23 handle in your practice?

24 A My practice has been varied over the years. I've handled  
25 a lot of civil rights litigation. I've handled a lot of

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1 criminal law cases. I've done some civil litigation as well  
2 but it depends on the given year. In the last couple of years  
3 mostly criminal law.

4 Q Did there come a time when you met an individual, you've  
5 heard his name during the trial, named Shaheed Khan?

6 A I did.

7 Q Known as Roger Khan, correct?

8 A That's correct.

9 Q From Guyana, correct?

10 A That's correct.

11 Q Is this the first time that you had experience with a  
12 case from Guyana?

13 A Frankly it was. It is the first time I ever heard of  
14 Guyana until somebody reminded me of an incident that stood  
15 out in my mind from the past, but not from my representing  
16 anybody.

17 Q What were the circumstances of meeting him, becoming his  
18 lawyer? How did it all happen?

19 A Lawyers often have this process that we go through.  
20 Somebody is arrested. Somebody may know a lawyer to represent  
21 to them, not a lawyer to recommend. Sometimes they're in  
22 jail. People who are in jail recommend their own lawyers or  
23 other lawyers. So, you have what is oftentimes in the  
24 business called a beauty contest. I go to see you. The next  
25 lawyer goes to see you and the next lawyer, so forth. The

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1 client meets, talks fees, what he thinks about you, asks about  
2 your experience. Today's type of client checks you out on the  
3 Internet, what's your web site, whatever they want to look at.

4 At some point they get back to you, may want a  
5 second or third meeting. Then there's a selection process.

6 Q Was there such a "beauty contest," as you call it, as  
7 many of us call it, in connection with the case of Roger Khan?

8 A I was at least one of a half dozen lawyers he saw.

9 Q Were you retained the first time you met him?

10 A I was not. I think after the third meeting with Mr. Khan  
11 he told me he was going to hire me, but only as what was  
12 called local counsel, which is he had an attorney before I  
13 went to see him, an attorney before he even came to the  
14 United States from Miami.

15 Q What was his name?

16 A John Berghendahl.

17 Q Spell it for the reporter.

18 A I think B E R G H E N D A H L. Mr. Khan advised me he  
19 was going to hire me to assist Mr. Berghendahl, to act as  
20 local counsel, I was in New York, make appearances, make  
21 business for Mr. Khan that would make it easier for  
22 Mr. Berghendahl to continue in the case.

23 Q What happened next?

24 A Ultimately it became a change of roles. I became a lead  
25 counsel. Mr. Berghendahl became second counsel.

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1 Q When were you formally retained?

2 A The week of August -- the first week of August, 2006.

3 Q When you were first retained, what did you know about the  
4 case?

5 A Very little. Mr. Berghendahl provided me some  
6 information, some background on Guyana. He had handled  
7 Guyanese cases in the past. We had an indictment, a charge.  
8 It was a one paragraph charge, charging Mr. Khan with  
9 conspiracy, conspiracy to commit violations of our narcotic  
10 laws with others without saying who the others were or any  
11 other information except that it was for the period 2001 to  
12 2006.

13 Q During your representation of Mr. Khan, did that change?

14 A Well, I began to meet with the client and to find out  
15 facts from him. The number of charges ultimately changed.  
16 That didn't happen until February, 2007.

17 MR. SHARGEL: I'm going to put before the witness  
18 what's marked for identification as Defendant's Exhibit S301.

19 Q Do you recognize what that is?

20 A I do.

21 Q What do you recognize it to be?

22 A It's an indictment against Mr. Khan, which was his name,  
23 cover sheet of the indictment of Mr. Khan. I believe it's the  
24 original indictment.

25 Q This is the original first paragraph indictment that you

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1 were talking about?

2 A Yes, that's the one I believe brought in April of 2006 by  
3 the prosecutors in this building and which I got to see when I  
4 was hired.

5 MR. SHARGEL: Offer this into evidence, your Honor.

6 MR. D'ALESSANDRO: No objection.

7 THE COURT: Received.

8 (So marked.)

9 Q Now that it's received, if I could have it on the screen,  
10 you knew from the indictment that Mr. Khan was also known as,  
11 according to the charge, the caption, also known as not only  
12 Roger Khan but Short Man, correct?

13 A Yes, it's Shaheed Khan, also known as Roger Khan and  
14 Short Man.

15 Q Did that later -- and we'll get to it in a little  
16 while -- but did that become an issue in the case, the  
17 identification of Roger Khan as Short Man?

18 A It became a substantial issue in the case.

19 Q Ultimately when Roger Khan was facing the last indictment  
20 that was brought against him, what was the penalty that he was  
21 facing?

22 A When there was a superseding or additional charges  
23 brought around February of 2007, about six months later, the  
24 prosecutors charged him with what they call an 848 charge  
25 which carried with it life with no parole.



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1 Q Going back to the time when you were first retained  
2 before the indictment had been superseded, the indictment that  
3 we had just appear on the screen, what information did you  
4 have other than as you pointed out? This is essentially one  
5 paragraph. You have this page and then this page, concludes  
6 on the top of page two. What information did you have other  
7 than this indictment?

8 A We had the period of time and we were told that he was  
9 being charged with an importation of drugs. As you can see  
10 from the document, it shows nothing about with whom he  
11 purportedly did this or any other details.

12 Q What was the status of the discovery of the first weeks  
13 or month? I'm focusing on the period August, the first week  
14 in August as you've testified, 2006 and, say, to the end of  
15 that year, 2006, what discovery did you have in the case?

16 First explain what discovery means.

17 A We have laws, as you've heard about. One of the laws is  
18 a law which requires prosecutors to turn over certain  
19 materials to the defense. There are different times when they  
20 have to make those available. Initially what we call  
21 discovery, a process where they're required to give us very  
22 limited information. If a client made a statement to them,  
23 they have to give you that. If there were search warrants or  
24 eavesdropping, they would have to give you copies of that and  
25 the tapes. They would have to give you your client's

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1 background information when he was processed, told him he was  
2 5-9, 180 pounds, give you that form. Other than that, you get  
3 nothing. You do not start to get anything of any detail from  
4 the prosecutors in any case in the federal system.

5 MR. D' ALESSANDRO: Might we approach?

6 THE COURT: Yes.

7 (Continued on next page.)  
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1 (Si de bar.)

2 MR. D' ALESSANDRO: That i s j ust not the case. Hi s  
3 answer was you get statements, pedigree i nformation. That' s  
4 not Rule 16.

5 THE COURT: I f he says things that you think are  
6 fal se, shoul dn' t you wai t unti l cross-exami nati on? I thi nk  
7 you' re ri ght. That doesn' t descri be rule 16.

8 MR. D' ALESSANDRO: Fai r.

9 (Conti nued on next page.)

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1 (Open court.)

2 Q At that stage of the proceedings, do you get a witness  
3 list?

4 A You do not. In fact, you don't get a witness list until  
5 the week before trial, sometimes two days before trial.

6 Q Do you get the prior statements, the grand jury  
7 testimony, interviews? You get that before?

8 A That's called 3500 material under the federal system. We  
9 don't get that until sometimes a day before trial starts, a  
10 week before, sometimes after the witness has already  
11 testified.

12 Q As a criminal defense lawyer -- by the way, did you have  
13 a retainer agreement with Mr. Khan?

14 A I did.

15 Q As a criminal defense lawyer, what were you obligated to  
16 do in your role?

17 A Well, the first thing we have to do is talk to the  
18 client, find out what his version of the events may be. The  
19 second step while we're waiting for some discovery is to map  
20 out what we're -- what we're going to do in the case. This  
21 includes make a request of the court for a client that would  
22 involve meeting with the client to develop the facts of the  
23 case and try to confirm some of the information the client is  
24 giving you. That's at the very initial stages, which is what  
25 we were doing with Mr. Khan.

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1 Q Did Roger Khan ever admit to you, and the question is did  
2 he ever admit to you that he was guilty of the crimes charged  
3 in the indictment?

4 A He never admitted his guilt. To the contrary, he  
5 maintained to me he was innocent of the charges for which he  
6 had been kidnapped and brought to the United States.

7 Q You say "kidnapped and brought to the United States."  
8 How did that happen? How did he actually get to the  
9 United States?

10 A Mr. Khan was supposedly going back to Guyana, landed in  
11 Trinidad and American DEA agents grabbed him, put him on a  
12 private plane, flew him back to the United States.

13 Q After your client told you that he was innocent or not  
14 guilty of the charges that were contained in the indictment,  
15 what steps did you take to either verify or refute what he was  
16 telling you?

17 A The first thing we did, Mr. Khan had hired an attorney in  
18 Trinidad to contest the fact he had been kidnapped with their  
19 government. Because that's not my area of expertise,  
20 extradition, kidnapping, I hired a person who I believed to be  
21 an outstanding expert in that field, a lawyer by the name of  
22 Jacques Semmelman, used to be with the U.S. Attorney's Office,  
23 to investigate and legally research whether or not the United  
24 States had violated Mr. Khan's rights in the way they brought  
25 him to the United States. That was what was going on in the

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1 months of August, September, October, November of 2006.

2 Q When you as a criminal defense lawyer conduct an  
3 investigation, is a guilty plea one of the things that is  
4 considered?

5 A Guilty pleas are always considered. You either have to  
6 try to figure out whether you have a defensible case or try to  
7 see if you can mitigate potential exposure for your client.  
8 If ultimately you conclude your client is going to be  
9 convicted, the likelihood he will be convicted, you try to  
10 tell him what the facts are, or her, what the facts may be.  
11 They have to make that decision, but you can tell them what  
12 you think their position is.

13 Q Did your investigation in connection with the Khan case  
14 reveal the fact that asserted Mr. Khan's assertions he was  
15 innocent?

16 A Everything seemed to be confirming what Mr. Khan was  
17 telling me at the initial stages of our investigation and  
18 thereafter throughout the remainder of it. He told us --

19 Q Can you describe exactly what that was?

20 A He described the kidnapping to us. We knew there were  
21 sworn affidavits from U.S. officials saying that didn't  
22 happen. We confirmed with at least ten different individuals  
23 that in fact what Mr. Khan was saying was accurate.

24 Ultimately an Attorney General associated with the Trinidad  
25 Attorney General's office confirmed Mr. Khan had been telling

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1 the truth.

2 He told us he was not the only Short Man in  
3 Guyana --

4 MR. D' ALESSANDRO: Objection.

5 THE COURT: Excuse me, there's an objection.

6 THE WITNESS: Sorry.

7 MR. D' ALESSANDRO: Hearsay.

8 THE COURT: Understood. I was about to -- I  
9 didn't want to interrupt the questioning. Let me focus for  
10 the jury the purposes for which I'm permitting this testimony  
11 about statements Mr. Simels said were made to him.

12 He mentioned about ten people confirming versions of  
13 events, even for that what Roger Khan, his own client said for  
14 him. We're not trying the Khan case here. We're not trying  
15 whether Roger Khan was guilty or not guilty of the charges he  
16 faced in another judge's courtroom. We're trying the charges  
17 against Mr. Simels and against Ms. Irving.

18 One of the things that you will be called upon to  
19 determine; that is, to decide whether the government has  
20 proved beyond a reasonable doubt is the requisite, the  
21 required mental state of the defendants.

22 For example, there will be a couple of charges in  
23 which the government is going to have to prove there was an  
24 effort to corruptly persuade other persons, to influence their  
25 testimony. I'm giving you this in broad strokes. I'll give

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1 you a detailed charge later.

2 What was in this defendant's mind, Mr. Simels's mind  
3 in terms of his intent matters. It will be crucial, in fact.  
4 I'm going to allow him to testify to things that Roger Khan  
5 told him and that other people imparted to him as Khan's  
6 lawyer, not to prove those things were true. Mr. Khan is not  
7 here to be cross examined. These ten other people are not  
8 here to be cross examined, but to the extent that that  
9 information imparted to Mr. Simels sheds some light on what  
10 was in his mind, that's fair ground for your consideration.

11 For example, you can't use the fact that ten people  
12 confirmed a particular version of events provided by Mr. Khan  
13 to Simels to prove that version was true, but you can consider  
14 for the fact that it was said to Mr. Simels and it may have a  
15 bearing -- you'll decide if it does -- on his state of mind  
16 in dealing with people like Vaughn, others, that you've heard  
17 a good deal of testimony about.

18 Do you understand the distinction, the limited  
19 purpose you could consider these statements of Mr. Simels, not  
20 to the truth, but to the extent, if any, you conclude it sheds  
21 light? Raise your hand if you don't understand.

22 Any objection to the limiting instruction?

23 MR. SHARGEL: No, sir.

24 THE COURT: Is that the essence of your objection.

25 MR. D'ALESSANDRO: Yes, sir.



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1 Q I don't know if you still have the question, but I was  
2 asking you at this stage, were you gathering facts that in  
3 your mind supported the proposition Roger Khan was being  
4 truthful?

5 A In the fall of 2006?

6 Q Yes.

7 A In the fall of 2006, we were making our best efforts to  
8 gather as many facts as we could. I was reading on a daily  
9 basis the Guyanese newspapers, looking back through the  
10 Guyanese newspapers for a four or five-year period of time,  
11 reading books on Guyana that I could obtain here in the  
12 United States to understand what has been represented to me by  
13 my client and see whether I could confirm some of the  
14 information that was given.

15 Q You know we saw a few minutes ago that the government was  
16 claiming Roger Khan was known as Short Man, right?

17 A That's correct.

18 Q Did that have some significance in connection with the  
19 case against Roger Khan, the claim he had a nickname or was  
20 known as Short Man?

21 A Yes. It was, as I said, a substantial factor in terms of  
22 my belief Mr. Khan was not guilty of the charges that the  
23 prosecutor had brought and which impacted substantially on the  
24 entire case.

25 Q What did you find out about the name Short Man, how that

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1 played into this investigation and drug prosecution?

2 A By February of 2007, we had gathered the following, or I  
3 had gathered the following facts. Not only had the indictment  
4 charged Roger Khan as being Short Man, but the government had  
5 represented in court to that judge that Roger Khan was  
6 responsible for all cocaine that came to the United States  
7 from Guyana, every shipment, every courier was Roger Khan's  
8 responsibility.

9 They claimed their proof was that this person, Roger  
10 Khan, was known as Short Man in the drug business. We had  
11 obtained information from part of the discovery the  
12 prosecutors provided to us in November of 2007 a document that  
13 was purportedly a drug ledger; that is, contained drug  
14 records; that there was a reference to a person named Short  
15 Man in that ledger.

16 In trying to find out who had been the author of  
17 that ledger, who had written the ledger, I had contacted  
18 lawyers who were involved in the case where that ledger had  
19 first been used. I spoke to all the defense attorneys who  
20 represented people who went to trial in that case. They told  
21 me they had cross-examined a woman named Alicia Jagnarain.

22 Q Is that the same Alicia Jagnarain we've been hearing  
23 about in this trial?

24 A Exactly.

25 Q Go on.

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1 A That they had cross examined this woman, notwithstanding  
2 their view she was not telling the truth, they told me about  
3 what she had said during the trial. I asked them for any  
4 documents they might have that would be helpful to us in  
5 investigating Alicia Jagnarain. I asked them for opinions  
6 about Alicia Jagnarain, a copy of the ledger and any other  
7 documents that they had that they could furnish, including her  
8 3500 material from that trial. They provided that to us. So,  
9 we now had a set of what Alicia Jagnarain was not only telling  
10 the jury in that one case, but what she was talking about in  
11 general about her involvement in the drug business.

12 Q What did the testimony say, again, in your mind, if you  
13 know, if you saw it, what did the testimony say about Short  
14 Man?

15 A I then ordered the testimony from the court reporters,  
16 got a copy of her testimony. I read that section where one of  
17 the lawyers had asked her do you know who that person is in  
18 the ledger known as Short Man? She said I have no idea who  
19 that is. So, to me, as the first prong, I knew one of the  
20 government's principal witnesses had at Roger Khan's  
21 prospective trial would say they she didn't know who the  
22 person was. It wasn't a reference to drugs, it was a  
23 reference on a list of telephone numbers of people in the  
24 front of the book, many of whom Ms. Jagnarain had described to  
25 the government as not being drug related people but only

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1 friends.

2 Q But there was reference to a Short Man?

3 A Reference to a Short Man.

4 Q Did you make efforts at or around that time, focusing you  
5 to January of 2007, to find out from the government  
6 prosecutors whether there was evidence of other short men, or  
7 other people known as Short Man?

8 A Not only to write to the prosecutor and in the case and  
9 ask whether or not they had evidence as to whether Roger Khan  
10 was the only Short Man that they knew about, but I also  
11 pointed out to them in this next month, month and a half  
12 period, that my own research showed there were a number of  
13 different Short Men that existed, that they themselves had  
14 prosecuted. I said I thought you needed to tell the judge in  
15 the case that your theory of the case has holes in it. They  
16 did not respond to that correspondence.

17 Q Let me show you what's marked for identification as  
18 Defense S-302-A. I -- let me focus it.

19 Are you able to see that, Mr. Simel s?

20 A I am.

21 Q I ask you, are you able to recognize this?

22 A I do recognize the letter.

23 Q What do you recognize it to be?

24 A A letter I wrote on January 9th, 2007 to Paige Petersen,  
25 then the Lead Assistant U.S. Attorney in the prosecution of

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1 Shaheed Khan.

2 Q Does this letter deal with the Short Man issue?

3 A In part.

4 MR. SHARGEL: Offer it into evidence.

5 MR. D' ALESSANDRO: Objection.

6 THE COURT: Come up.

7 (Continued on next page.)

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1 (Si de bar. )

2 THE COURT: What's your objecti on?

3 MR. D' ALESSANDRO: If I could see it again, your  
4 Honor?

5 THE COURT: Yes (handi ng).

6 MR. SHARGEL: Thi s has been provi ded.

7 MR. D' ALESSANDRO: It has. There's a lot of what's  
8 in this letter -- first of all, it's not necessary. The  
9 witness has testified that he already brought it to the  
10 government's attention, unnecessary bol steri ng of the wi tness.  
11 There's a lot of stuff in this letter, just li tigation, claims  
12 of impropriety, things for Brady, not the Khan case. This is  
13 not a matter whether or not the government was prosecuting it.  
14 This is a snapshot in time. The jury doesn't need it, not  
15 relevant to put all the discourse, an all the letters written  
16 in this case, appearances in this case, to get a fair  
17 understanding what this letter is in its context.

18 MR. SHARGEL: The government had tried to  
19 corroborate everything that Selwyn Vaughn said, the wi tness  
20 said, putting in portions. I'm not here to try the Khan case.  
21 I'm going to suggest the government is going to argue  
22 Mr. Simel s's testimony is not worthy of belief, attack his  
23 credibi lity. I have documents that will be supporting a lot  
24 about what he's saying. I'm not introducing this to make  
25 arguments about the pace or progress or anything about the

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1 case.

2 Let me tell you where this is leading. This request  
3 was set forth in letters written and finally in September,  
4 2008, right before Mr. Simel s is arrested, the government  
5 changes its position, says they don't take the position the  
6 defendant is the only person from Guyana named Short Man.  
7 This came as a result, we believe, of his interview of one of  
8 the witnesses around this time in 2008.

9 This is relevant to supporting his credibility.  
10 It's credible about Short Man.

11 THE COURT: I think the inquiry as to the  
12 government about other people known as Short Man is fair game,  
13 I'll allow it. The rest of this other stuff I'm not going to  
14 let in.

15 MR. SHARGEL: I'll redact it.

16 THE COURT: Stipulate or redact it. Don't show it  
17 to the jury. Be careful when you do this to avoid things like  
18 just suggestion to the jury there was something inappropriate  
19 in the government not running to the court, said they have  
20 holes in their case because Bob Simel s said it had holes in  
21 the case. Try to avoid that. You understand what I'm  
22 referring to?

23 MR. SHARGEL: I understand.

24 THE COURT: If you don't avoid it, I'm going to  
25 jump in and say there's nothing inappropriate with a

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1 prosecutor not following his instructions to go to the court,  
2 say the case is bad. It's a suggestion of impropriety.

3 As to this suggestion, I think there's going to be  
4 an issue about whether he was suborning perjury when he asked  
5 Selwyn Vaughn to testify that he knew other people as Short  
6 Man, Vaughn said he didn't. This bears on it sufficiently,  
7 I'm going to allow it in. I'm not going to receive in  
8 evidence all this other junk in the letter.

9 MR. SHARGEL: Can I then, since I can't redact it  
10 now, just read it?

11 THE COURT: I'll receive it as redacted. You can  
12 read what's in there. You'll prepare a redacted version to  
13 submit to the jury.

14 MR. SHARGEL: Absolutely.

15 (Continued on next page.)

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1 (Open court.)

2 THE COURT: What exhi bi t?

3 MR. SHARGEL: Defense Exhi bi t S 302 A.

4 THE COURT: Subject to redaction di scussed at si de  
5 bar.

6 (So marked.)

7 MR. SHARGEL: In connection with thi s exhi bi t, may  
8 I publi sh by reading to the jury that portion that's been  
9 admi tted?

10 THE COURT: Yes.

11 MR. SHARGEL: The l etter is dated January 9th,  
12 2007. It's addressed to Paige Petersen, Assistant United  
13 States Attorney and the pertinent part reads as follows.

14 Three, if any of those wi tnesses, cooperators advi se  
15 the government of any potential Brady i nformation that the  
16 source of the shi pments for di stri bution were someone other  
17 than my cli ent or that they did not know the source or that  
18 there's another i ndi vi dual or i ndi vi dual s known to them as  
19 Short Man or Big Man et al , then that should be di scl osed at  
20 thi s juncture.

21 Q That's part of the l etter that you wrote to the Assi stant  
22 United States Attorney on January 9th, 2007, correct?

23 A That was the l etter I wrote.

24 Q That was not the end of the subject, though, was i t?

25 A No, i t was conti nuous.

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1 Q Do you remember writing a letter, again, approximately a  
2 week later or less than a week later on January 15th, 2007?

3 A I do.

4 Q I show you what's been marked for identification of as  
5 Defense Exhibit S 302-B. I ask you to look at that letter.  
6 Tell us what it is?

7 A It is a letter I wrote to Ms. Petersen, same prosecutor  
8 on January 15th which I sent to her by facsimile at that date.

9 Q Was this again in connection with the Short Man issue?

10 A In part.

11 MR. SHARGEL: I offer that part, your Honor that  
12 pertains to the subject.

13 THE COURT: Can I see it?

14 MR. SHARGEL: Yes.

15 THE COURT: On the screen. You can put it on the  
16 screen.

17 MR. SHARGEL: You're right.

18 THE COURT: I don't have your eyes. Can you blow  
19 it up a little bit so I could see it?

20 MR. SHARGEL: Is that good?

21 THE COURT: Yes.

22 Any objection?

23 MR. D'ALESSANDRO: Yes, your Honor.

24 THE COURT: Overruled. Proceed. What is the  
25 number?

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1 MR. SHARGEL: 302-B. May I publish by reading that  
2 portion of the letter that's admitted?

3 THE COURT: Yes.

4 MR. SHARGEL: Again, this is January 15th, 2007, a  
5 letter to the same woman, Paige Petersen. On the second page,  
6 this paragraph appears.

7 The government has represented at prior submissions  
8 to the District Court in other investigations information  
9 concerning individuals known as Short Man and Boss Man. I  
10 again submit that the government is required to investigate  
11 and disclose if any other person is known to the government to  
12 use those nicknames. Since you were the AUSA, Assistant  
13 United States Attorney, assigned to one or more of those  
14 matters and Mr. Ramos to a number of the other prosecutions,  
15 this information is well within your immediate realm of  
16 knowledge. Illustratively, and by no means exhaustively in  
17 the prosecution of Vishnu Budhan-Persaud, ICE Agent Gerald  
18 Handley, referenced Short Man as a person as CS-1 Krishna, and  
19 another individual, distributed drugs to an individual named  
20 Short Man. The government was provided a telephone number for  
21 Short Man and obviously additional information by CS-1 and  
22 others as to the identity of Short Man. It behooves the  
23 government, having alleged to the court an identifying aspect  
24 of my client's involvement is his nicknames Short Man and Boss  
25 Man and yet to withhold information in their possession that

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1 they are aware of other individuals involved in trafficking of  
2 cocaine bear the same nickname without disclosing same as  
3 Brady-related activity.

4 Q February 9th, 2007, do you remember writing again to the  
5 United States Attorney's Office on the subject of Short Man?

6 A I did.

7 Q I show you what's been marked as Defense Exhibit S 302-C  
8 for identification. I ask if you recognize that document?

9 A I do, the letter I wrote to Ms. Petersen on February 9th,  
10 2007.

11 MR. SHARGEL: Offer a redacted version. I'll be  
12 happy to show your Honor the portion I'm offering. Here's  
13 page two. Is that sufficiently large, your Honor?

14 THE COURT: Yes, thank you.

15 (Pause.)

16 THE COURT: Any objection?

17 MR. D'ALESSANDRO: Same as before, your Honor. We  
18 would ask for an instruction.

19 THE COURT: The instruction regarding?

20 MR. D'ALESSANDRO: May we approach?

21 THE COURT: No. Received.

22 (So marked.)

23 MR. SHARGEL: Here again may I publish by reading  
24 these three paragraphs?

25 THE COURT: Yes. I take it these are offered not

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1 to prove the truth of any assertions in the letter, but to the  
2 intent, if any, it sheds light on the state of mind of your  
3 client?

4 MR. SHARGEL: Exactly.

5 THE COURT: Is that the instruction you're asking  
6 for?

7 MR. D' ALESSANDRO: Yes.

8 THE COURT: Understood, ladies and gentlemen? Same  
9 limiting instruction applies here. None of these statements,  
10 out of the court statements, are offered to prove the truth of  
11 what's in these letters that Mr. Shargel will read as an  
12 excerpt of this letter, but offer to the extent, if any, to  
13 shed useful light on your judgment of the state of mind at the  
14 time of Mr. Simels's, at the time of the alleged acts in the  
15 case.

16 Go ahead.

17 MR. SHARGEL: This letter is dated February 9th,  
18 2007. Once again to Paige Petersen, these are portions  
19 admitted into evidence, three paragraphs on page two.

20 The government has alleged my client's connection to  
21 prior shipments of cocaine into the United States. All  
22 interviews of witnesses in connection with the seizures in  
23 2003 and 2004 in which those witnesses/cooperators advised the  
24 government of any potential Brady information; that the source  
25 of the shipments or distributions were someone other than my

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1 client or that they did not know the source or that there's  
2 another individual known to them as Short Man or Big Man, et  
3 al .

4 Four, the government has represented prior  
5 submissions to the District Court in other investigations  
6 information concerning individuals known as Short Man and Boss  
7 Man. I again submit the government is required to investigate  
8 and disclose if any other person is known to the government to  
9 use those nicknames. Since you were the AUSA assigned to one  
10 or more of those matters and Mr. Ramos to a number of the  
11 other prosecutions, this information is well within your  
12 immediate realm of knowledge.

13 Five, as I pointed out in prior correspondence in  
14 the prosecution of Vishnu Budhan-Persaud, ICE Agent Gerald  
15 Handley referenced Short Man as a person that CS-1 Krishna and  
16 another individual distributed drugs to an individual named  
17 Short Man. The government was provided a telephone number for  
18 Short Man and obviously additional information by CS-1 and  
19 others of the identity of Short Man.

20 It behooves the government, having alleged to the  
21 court an identifying aspect of my client's involvement is his  
22 nicknames Short Man and Boss Man and yet to withhold in their  
23 possession they're aware of other individuals involved in  
24 trafficking of cocaine bear the same nickname without  
25 disclosing same as Brady-related material .

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1 Q Could you tell us what Brady, the shortest of terms, what  
2 Brady material means?

3 A There's an old Supreme Court decision, Brady, which we  
4 use to signify exculpatory or information that might be  
5 helpful to a defendant that comes into possession of a  
6 prosecutor. They have an obligation to turn it over to us.

7 Q Do you remember writing to the government on --  
8 withdrawn. We'll get to that in a moment.

9 Do you remember having an investigator by the name  
10 of Frank Gonzalez?

11 A I use an investigator named Frank Gonzalez in the course  
12 of this case from the late fall of 2006 until the summer of  
13 2007.

14 Q Did you ask Frank Gonzalez to interview a certain person  
15 in connection with this case?

16 A Yes, Mr. Gonzalez and I had gone to Guyana at the end of  
17 January, 2007 to try to confirm or investigate some of my  
18 client's assertions and to try to investigate the case, since  
19 all the events that were being described in the case occurred  
20 essentially in Guyana.

21 One of the things Mr. Gonzalez and I had determined  
22 from a source of information down there, individuals who knew  
23 various other people involved in the cocaine trade, was that  
24 the person who was referred to as Short Man in the ledger that  
25 Ms. Jagnarain had prepared was in fact in jail already in the

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1 United States. His name was Peter Headley.

2 Q As a result of learning that in Guyana, did you give  
3 Mr. Gonzalez an assignment?

4 A When we returned, I asked Mr. Gonzalez to fly to Ohio to  
5 the northeast correctional facility there and to go interview  
6 Mr. Headley, see if he would speak to us.

7 Q What happened?

8 A He in fact spoke to Mr. Headley. Mr. Headley confirmed  
9 to us he, not Roger Khan, was the person referred to as Short  
10 Man in the Alicia Jagnarain letters.

11 Q Did you make that visit or sent an investigator?

12 A I sent an investigator, in the first instance telling the  
13 institution my investigator was coming there.

14 Q The investigator was named?

15 A Frank Gonzalez with the U.S. Marshals office here in the  
16 Eastern District of New York.

17 Q Did Mr. Gonzalez furnish you with a report?

18 A Mr. Gonzalez did give me a report.

19 Q Let me show you what's been marked as Defense Exhibit  
20 S-303 for identification. I would ask you to look at this.  
21 You recognize this, this exhibit?

22 A I do, as a copy of a report to Frank Gonzalez provided to  
23 me regarding his interview of Peter Headley in March of 2007.

24 MR. SHARGEL: Offer a redacted portion. I'll show  
25 you what I'm offering, your Honor. I'll slide it down as your



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1 Honor looks at it or I could do this (indicating).

2 (Pause.)

3 THE COURT: Any objection?

4 MR. D'ALESSANDRO: Double hearsay, your Honor.

5 THE COURT: Come up.

6 (Continued on next page.)

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1 (Side bar.)

2 THE COURT: Maybe I'm missing something. Doesn't  
3 it make it more likely than not he's not inducing Vaughn to  
4 commit perjury if he himself believes that there are multiple  
5 Short Man-named folks in Guyana and the Short Man who is the  
6 drug dealer is not his client?

7 MR. D'ALESSANDRO: The problem is Selwyn Vaughn  
8 said in the tapes Short Man, it's Roger Khan. What the  
9 defendant does in response starts saying this guy is named  
10 Short Man, this guy is named Short Man. Whether or not he  
11 believes or he's aware of other people being called Short Man  
12 is not the issue. The issue is the witness said Short Man  
13 means Roger Khan. In his efforts to induce that witness to  
14 say other people are Roger Khan, your Honor.

15 THE COURT: What you're saying is it's possible for  
16 two things to be true. One is that Robert Simel s believes  
17 there's more than one Short Man and that the government's  
18 Short Man is not Roger Khan. Second, he can still suborn  
19 perjury in dealing with Selwyn Vaughn, right?

20 MR. D'ALESSANDRO: Yes.

21 THE COURT: What I'm suggesting to you and you  
22 haven't disabused me of the fact he believes in the truth of  
23 this even if Vaughn doesn't, make it germane to his state of  
24 mind when he's speaking to Vaughn.

25 MR. D'ALESSANDRO: I understand the ruling.

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1 THE COURT: Thank you.

2 (Open court.)

3 MR. SHARGEL: I offer into evidence Defense Exhibit  
4 S-303 as redacted, evidenced by the yellow highlighting.

5 THE COURT: As redacted it's received.

6 (So marked.)

7 THE COURT: Again, the same limiting instruction.  
8 Would you put it back up so I could see it?

9 MR. SHARGEL: Sure.

10 THE COURT: These are statements which according to  
11 the witness were made to him by other people can't be  
12 considered by you to prove the truth of what these statements  
13 refer to, these out of court folks said to Mr. Simel s but you  
14 can consider the fact that these statements were made to  
15 Mr. Simel s because it may have a bearing, you're the ones to  
16 decide this, his state of mind in dealing with Vaughn and  
17 others, also the interactions that are at the heart of the  
18 case. Understood?

19 Go ahead, Mr. Shargel .

20 MR. SHARGEL: It's admitted?

21 THE COURT: Yes.

22 MR. SHARGEL: May I publish by reading the portions  
23 that are admitted?

24 THE COURT: You may.

25 Q To remind us, this is the document you received from the

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1 investigator Frank Gonzalez?

2 A The report of his interview of Peter Headley in Ohio.

3 MR. SHARGEL: He has heard that Roger Khan is also  
4 called Short Man, but has only heard him referred to as Boss  
5 Man because he was their employer. However, the Short Man  
6 referred to in the ledgers belonging to David is him, Headley,  
7 in parentheses. Mr. Headley concluded his comments by stating  
8 that none of these people including Richard and Delvin Adams  
9 know Roger Khan and in all his dealings with David's drug  
10 organization both in Guyana and New York, he has never seen or  
11 heard of anyone dealing with Roger Khan. He concludes they  
12 are all lying in order to avoid a heavy prison sentence.

13 You were told that in this report, right?

14 A Yes.

15 Q In February of 2008, did you again write to the  
16 government in connection with this issue of other Short Men?

17 A Yes.

18 Q Other people named Short Man, correct?

19 A Yes.

20 Q Let me show you in the last of these series of letters  
21 what has been marked for identification as S 302 D. What do  
22 you recognize it to be?

23 A The letter sent by both facsimile and regular mail to  
24 Paige Petersen.

25 Q Is this on the topic of Short Man again, in part?

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1 A In part.

2 MR. SHARGEL: I offer that part, your Honor. This  
3 is the part (indicating). It goes on to the second page.

4 THE COURT: Hang on one second, please.

5 MR. SHARGEL: Sure.

6 (Pause.)

7 THE COURT: It looks familiar. The miracle of word  
8 processi ng.

9 MR. SHARGEL: Exactly.

10 THE COURT: Any objection?

11 MR. D' ALESSANDRO: Same.

12 THE COURT: Overruled. Received as redacted,  
13 S 302 D.

14 (So marked.)

15 MR. SHARGEL: May I publish the received parts of  
16 this letter?

17 THE COURT: Yes.

18 MR. SHARGEL: Dated February 14th, 2008, again  
19 Paige Petersen. The court is right, there's repetition here.  
20 I'll try to read this a little more quickly.

21 THE COURT: Summarize it.

22 MR. SHARGEL: Essentially the same thing, asking  
23 for Brady material, asking for other people for disclosure of  
24 other people in the drug business named Short Man or Boss Man  
25 or Big Man, language is essentially the same, the date is

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1 di fferent, February 14th, 2008.

2 THE COURT: Let's break for lunch. Don't discuss  
3 the case. We'll resume at 2:00 o'clock. All rise.

4 (Jury leaves courtroom.)

5 THE COURT: What's the estimated time of the  
6 conclusion of your direct?

7 MR. SHARGEL: Let me say at the outset it's not  
8 going to be as laden with documents as this area. We have a  
9 lot of documents to put in, but not as intense as this.

10 I would guess somewhere around an hour and a half,  
11 maybe two.

12 THE COURT: Thank you.

13 (Luncheon recess.)

14 (Continued on next page.)

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1 A F T E R N O O N S E S S I O N

2 (In open court; jury not present.)

3 THE COURT: Okay. Are we all set?

4 MR. SHARGEL: Yes.

5 THE COURT: Bring in the jury, please.

6 You can be seated, in the back. Just please rise  
7 when the jury comes in.

8 ROBERT SIMELS, resumed.

9 (Jury present.)

10 THE COURT: Please be seated, everyone.

11 DIRECT EXAMINATION (Continued)

12 BY MR. SHARGEL:

13 Q Mr. Simels, before we all took the lunch break, the  
14 questioning was about the Shortman issue, if I can shortcut  
15 with that. Do you recall that?

16 A I do, sir.

17 Q And we've now seen several parts of letters in which you,  
18 on behalf of your client, are seeking information about  
19 another Shortman; correct?

20 A That's correct.

21 Q When I say "Shortman," I mean the nickname, someone who  
22 goes by or uses the name Shortman; correct?

23 A That's correct, sir.

24 Q Did you finally receive an answer from the government on  
25 or about September 4, 2008?

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1 A Eighteen months after I started writing them, they  
2 finally conceded that what I had been saying all along was  
3 true.

4 Q Let me show you what's been marked for identification as  
5 S-304, Defendant's Exhibit S-304.

6 Are you able to see it.

7 A I am, sir.

8 Q What do you recognize this to be?

9 A This is the September 4, 2008 letter sent to us by the  
10 U.S. Attorney's Office in the Eastern District of New York,  
11 advising us --

12 Q Before you say what it advises you --

13 MR. SHARGEL: I'm going to offer it into evidence.

14 THE COURT: Any objection?

15 MR. D'ALESSANDRO: No, your Honor.

16 THE COURT: Received.

17 (So marked.)

18 Q So, this says, in one paragraph, "The government" -- why  
19 don't you read it?

20 A It was addressed to myself, cocounsel, Diarmuid White.  
21 It was in the matter of United States vs. Shaheed Khan, Docket  
22 Number 06 CR 0255.

23 It says: "Dear counsel: The government does not  
24 take the position that the defendant is the only person from  
25 Guyana who is nicknamed 'Shortman' or 'Short Man.' For



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1 example, in Call 3385 from the interception of 347-328-4022,  
2 there is reference to an individual in Guyana known as  
3 Shortman who has "17" there. The government believes that the  
4 reference to, quote, 'Shortman' in this particular call is a  
5 reference to Clayton Hudson."

6 Q What is the telephone number, 347-328-4022?

7 A There had been a wiretap that had been conducted by the  
8 prosecutors in another case, that had been given to us as part  
9 of discovery later on.

10 Q What did you understand the "17" there to be referring  
11 to?

12 A In that wire, that one of the numbers that had been was  
13 the 347-328-4022 belonging to a Nigel Rodney, also known as  
14 Sherwyn Lilly.

15 We had been maintaining that that Short Man was not  
16 Roger Khan. The "seventeen" referred to seventeen kilograms  
17 of cocaine in Queens, New York.

18 Q Who is Clayton Hudson?

19 A Clayton Hudson was a person from Guyana known as Short  
20 Man, and who we had disclosed same to the Court many times.

21 Q All right. Now, I would like to focus your attention  
22 from January of 2007, the trip that you made to Guyana. I  
23 think you already told the jury you went there that month with  
24 the investigator named Frank Gonzalez?

25 A I did.

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1 Q Could you tell us now what you learned in Guyana?

2 A There were a number of matters that we went to  
3 investigate and to try to learn information about. One was  
4 about the nickname Short Man, Boss Man, to learn about the  
5 cultural setting of Guyana.

6 I learned that everybody down there seemed to be  
7 referred to by a nickname. At one meeting alone, I met at  
8 least three or four people by the name of the Fine Man. There  
9 was Fine Man the race-car driver, Fine Man from Agricola.  
10 Everybody seemed to be called Fat Man, Short Man, Tall Man.  
11 It depended on who you were.

12 And I addressed that issue with the various people,  
13 how you distinguish one from another. They told me they just  
14 knew. That's how we go.

15 Q When you say you met four people named Fine Man, was Fine  
16 Man, who gave his name as Selwyn Vaughn, the witness who  
17 testified here, was he one of the people that you met in  
18 January of '07?

19 A He was not. One of Finemans was Andrew Morgan. One of  
20 the Fine Mans was a Dutch race-car driver, the biggest  
21 race-car driver in Guyana. But there were others.

22 Q Did you learn anything about the culture divide or a  
23 cultural divide that existed in Guyana?

24 A Guyana is basically divided in two rival factions, those  
25 who support what's called the PNC Party, a political party,

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1 People's National Congress, and the other people who support  
2 the People's Progressive Party, the PPP.

3 And they are more than just simply political  
4 enemies. There's a lot of violence associated with the  
5 activities of the divide between the two groups.

6 Q What was the source of your information on the issue of  
7 this cultural and political divide?

8 A I met with several members of Parliament. They have a  
9 parliament government in Guyana. I met with Ravi Dev, and I  
10 met with Freddie Kasoon, who was a well-known writer. I met  
11 with various political officials at the offices of the  
12 Guyanese Government to discuss these matters with.

13 Q What did you learn -- what, if anything, did you learn  
14 about Roger Khan during that trip to Guyana in January of '07?

15 A I learned that Roger Khan was a national hero.

16 Q In what sense?

17 A To many. Not to all, but to many.

18 In 2002, there had been a very -- to 2005, there had  
19 been a very violent period in Guyana, which had been the  
20 result of five people -- started when five people in February  
21 of 2002 escaped from jail, went to a village named Buxton and  
22 from there those people and many, many others in the village  
23 of Buxton, Agricola began to wage war on the Indian population  
24 of Guyana, massacring people, robbing people, and using  
25 AK-47's and other weapons that all seemed to come from the

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1 military of Guyana.

2 Q Where did Roger Khan fit into that?

3 A Roger Khan, apparently with the authority of the Guyanese  
4 Government -- and I say "apparently," I had spoken to the  
5 members of the Guyanese Government who had given him the  
6 authorization -- had organized a band of police officers as  
7 well as a Minister of Home Affairs, a fellow by the name of  
8 Ronald Gadraj, had organized separate groups to try, together  
9 with the Anticrime Division of the police, Anticrime Unit of  
10 the Police Department, to try to capture these people from  
11 Buxton, because essentially, the military in Guyana was  
12 controlled by members of the PNC party, who were supporters of  
13 this group in Buxton, who were called the Taliban by their own  
14 definition. The police could never get into Buxton to arrest  
15 them, and the military kept helping the people in Buxton to  
16 commit crimes.

17 Roger Khan had organized a series of police  
18 officers, together with Minister Gadraj, and they had been  
19 able to root out many of these people, who are then  
20 apprehended or killed by the police.

21 Q Did the name David Clark come up at any time during your  
22 January '07 trip?

23 A David Clark came up prominently during my meetings in  
24 Guyana, particularly with the Government of Guyana.

25 Q Tell us about that.

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1 A Apparently, David Clark was a member of the PNC party,  
2 and had also been the military commander. Together with a  
3 Colonel Ben and several other military officials, Edward  
4 Collins, who had acted as the military group overseeing  
5 Buxton, they were supposed to prevent the criminals from  
6 getting out, but somehow, the criminals always got out.

7 And apparently, the rivalry between David Clark on  
8 one side protecting the people in Buxton, and the criminals  
9 who were waging war on Guyana and Roger Khan, was a very  
10 public event down there.

11 Indeed, after Roger Khan had been arrested in  
12 December 2002 in Guyana, David Clark had openly told other  
13 members of the military that if he were present, he would have  
14 killed him.

15 MR. D'ALESSANDRO: Objection.

16 THE COURT: Sustained.

17 Structure this.

18 MR. D'ALESSANDRO: I move to strike the answer.

19 THE COURT: Granted.

20 Make it question and answer, not a narrative,  
21 please, Mr. Shargel. Structure it.

22 MR. SHARGEL: Very well.

23 Q This information came to you during the trip to Guyana in  
24 2007?

25 A In that meeting, in that visit, and others, yes.

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1 Q And what significance did that have in your thinking as  
2 to the probability of David Clark being involved with Roger  
3 Khan in the drug business?

4 A At that point, it didn't have any significance to me, but  
5 it would have significance to me about two months later, when  
6 I got the Lilly wiretap.

7 Q We'll get to that in a short while. I want to stay with  
8 what you were thinking at the time of the trip to Guyana in  
9 2007. Did you learn anything on the subject of Roger Khan's  
10 cooperation with the U.S. Government?

11 A I did.

12 Q Just tell us what you learned at that time. Again,  
13 during that period of time, what did you hear?

14 A I learned that in April of 2003, an American diplomat by  
15 the name of Steven Lesniak had been kidnapped by the Taliban  
16 and that the United States had sent FBI agents and State  
17 Department agents to Guyana to try to rescue Mr. Lesniak, that  
18 they had been introduced to the one person who might be able  
19 to help them, Mr. Khan, and within twenty-four hours,  
20 Mr. Lesniak was rescued from the Taliban group.

21 Q What impact did that have on your thinking as to whether  
22 Roger Khan was telling you the truth or not in connection with  
23 this drug accusation?

24 A That led me to believe that many of the accusations in  
25 the indictment were inaccurate.

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1 Q Why?

2 A They were accusing Roger Khan of having trafficked, sent  
3 drugs, to the United States in the spring, April, May, of  
4 2003, at the same time that he was sitting meeting with the  
5 FBI agents and State Department agents and providing them  
6 information about guns, drug trafficking and the kidnapping of  
7 Steven Lesniak.

8 Q While you were in Guyana, who drove you around?

9 A I was initially picked up by a former police officer by  
10 the name of Paul Rodriguez and a former police officer by the  
11 name of Gerald Pereria.

12 Q Did you meet a man named Sean Bellfield when you were  
13 down there?

14 A Not on the first occasion, I don't believe. I believe I  
15 met him at a second meeting.

16 Q A meeting other than the January 2007 trip?

17 A It was either on the first visit or on the second visit I  
18 met Sean Bellfield.

19 Q Let's say with Paul Rodriguez and Gerald Pereria, did you  
20 actually meet them in January of 2007?

21 A They picked me up at the airport when I landed.

22 Q How long were you in Guyana, if you recall?

23 A I think approximately three days.

24 Q And during those three days, did these men, Rodriguez and  
25 Pereria, drive you around?

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1 A They did.

2 Q You've heard testimony here about them being part of some  
3 violent gang; correct?

4 A I've heard that.

5 Q Could you tell us, when you met them in 2007, how they  
6 struck you, how they appeared to you?

7 A They were well dressed, well-mannered, well-spoken. They  
8 spoke English almost better than anybody that I met on a  
9 cultural level down in Guyana. They seemed to know everybody,  
10 everybody seemed to know them. They had easy access to the  
11 Government of Guyana's compound. We would go. They would  
12 call. I would get to see ministers. They seemed to be part  
13 of the national hero mode.

14 Q There was a reference on one of the tapes to the name the  
15 Oracle. Do you recall that?

16 A Yes, sir.

17 Q When I say "the tapes," one of the recordings that Selwyn  
18 Vaughn made during your meeting with him. Do you recall a  
19 reference to the oracle?

20 A I had mentioned I was trying to get a hold of the Oracle.

21 Q Tell the jury who the Oracle was.

22 A The Oracle is a judge who is member of their Court of  
23 Appeals, a higher court in Guyana, who had been meeting with  
24 me throughout my various trips to Guyana to brief me on legal  
25 issues that might impact on trying to get documents about



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1 David Clark from the Guyanese Government, as well as documents  
2 regarding Alicia Jagnarain. And so, I met with him both at  
3 his home and elsewhere.

4 Q While you were on this trip, did you take notes?

5 A I was taking notes as I was going. I had a laptop with  
6 me, and it's my practice to use a laptop and take the notes as  
7 people are talking to me, unless I'm walking around, and then  
8 I'll just make notes.

9 Q So, while you were in meetings and sitting in meetings,  
10 you were actually typing notes of the interview?

11 A I was. When I went into the meetings with the government  
12 officials, I didn't use my laptop in front of them. I made  
13 notes, and would go out and put them on my laptop.

14 Q At or about the time that the interviews took place, or  
15 shortly thereafter?

16 A Within minutes.

17 Q I show you what's been marked as Exhibit -- Defense  
18 Exhibit S-305-A for identification?

19 I ask if you recognize that.

20 A I do.

21 Q What do you recognize it to be?

22 A This is the collective notes of both Mr. Gonzalez and  
23 mine of the trip to Guyana in January 2007.

24 Q So, these are the notes that you recorded either while  
25 the person was speaking -- excuse me -- or shortly thereafter;

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1 right?

2 A Within minutes after.

3 MR. SHARGEL: I offer this into evidence.

4 THE COURT: Any objection?

5 MR. D'ALESSANDRO: Hearsay, your Honor, objection.

6 MR. SHARGEL: Only offered for Mr. Simels's state of  
7 mind.

8 THE COURT: How long is it?

9 MR. SHARGEL: It is seventeen pages.

10 THE COURT: Would you come up, please.

11 MR. SHARGEL: Yes.

12 (Sidebar.)

13 MR. D'ALESSANDRO: What defense number is it?

14 MR. LIPTON: Let me give you a copy of it.

15 (Pause.)

16 THE COURT: Why can't it be offered for a nonhearsay  
17 purpose?

18 MR. D'ALESSANDRO: Your Honor, I have this. I have  
19 388 documents. I don't know which one they are showing.

20 Thank you. I have it now.

21 THE COURT: How many documents do you intend to  
22 offer?

23 MR. SHARGEL: Fifty.

24 THE COURT: Do they know which ones?

25 MR. SHARGEL: Yes.

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1 THE COURT: Okay.

2 MR. SHARGEL: Not in the order --

3 MR. D'ALESSANDRO: We have 388 pages of documents.  
4 I don't know which ones.

5 MR. SHARGEL: We can give him the notebook that has  
6 one after the other.

7 THE COURT: We don't want to be doing this on the  
8 jury's time. If he doesn't know what you're offering, it's  
9 going to go slow.

10 MR. SHARGEL: I have a notebook -- Mr. Lipton will  
11 have the notebook that is going to have every document in  
12 chronological order of me introducing them.

13 THE COURT: It's a little late, but give it to him  
14 now. Better late than never.

15 Why shouldn't I allow this in with a limiting  
16 instruction?

17 MR. D'ALESSANDRO: Again, I had to do it as a  
18 prophylactic measure. It's very difficult for me to know  
19 which document.

20 THE COURT: Take a seat at the table and tell me why  
21 I shouldn't allow it in.

22 MR. D'ALESSANDRO: With the instruction, I don't  
23 have a problem.

24 THE COURT: All right.

25 (In open court.)

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1 THE COURT: You got that book for counsel?

2 MR. LIPTON: He's handing it over.

3 THE COURT: Let's do it now.

4 All right.

5 MR. SHARGEL: May I proceed?

6 THE COURT: You can proceed.

7 I have a feeling this phenomenon will repeat itself  
8 in the next hour or so. I'm going to allow this document and  
9 maybe some others into evidence, again, I emphasize, not to  
10 prove the truth of anything in the document. They are being  
11 offered because, in the defendant's view, it sheds useful  
12 light on what his own state of mind is when he's engaging in  
13 the activities that gave rise to the charges in this case.

14 So, whatever is in these notes, I've only glanced an  
15 at them, but whatever is in these notes shouldn't be  
16 considered by you as proof, that what's in those notes is  
17 actually true or happened, but rather, you can consider  
18 Mr. Simels's testimony that in fact these things were told to  
19 him, whether true or not. It has a bearing on his state of  
20 mind, his mental state, while the events that gave rise to  
21 this case occurred.

22 Okay? You understand the instruction.

23 Go ahead, Mr. Shargel.

24 (So marked.)

25 BY MR. SHARGEL:

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1 Q Now, with the Court's permission, I wanted to ask you  
2 some questions and publish just several pages of this, and  
3 then, of course, the entire document is in evidence here?

4 I have page eight. Let's zoom in on this.

5 Do you see the name Gonzalez at the top; that's the  
6 investigator Frank Gonzalez who was with you.

7 A That's correct.

8 Q And there's reference to a "Find Farrar at Tic Tock,  
9 Tic Tock Bar in Rockaway near home." Who is that?

10 A I have been told along with Mr. Gonzalez about a woman  
11 who was very intimately involved with both Dave Persaud and  
12 Alicia Jagnarain by the name of Farrar -- that's the way I was  
13 spelling it at the time -- who was working in the Tic Tock  
14 Tavern Bar near the Home Depot in Far Rockaway.

15 Q At this point in time, this is not to be confused with  
16 the dance club that we have heard testimony about?

17 A No. This is the club we thought initially she was  
18 working in.

19 Q You just mentioned Alicia Jagnarain. Did you learn  
20 anything about her during this trip, as well?

21 A There were many things I learned about Alicia Jagnarain  
22 during this trip. I learned from people who are -- admitted  
23 to me that they were engaged in drug trafficking in Guyana.

24 Q What significance would that have to you, whether Alicia  
25 Jagnarain was involved in drug trafficking in Guyana?

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1 A These individuals, including a fellow named Shoo Loo had  
2 told me that they had been selling drugs to Alicia in the  
3 United States for the two years, almost three years, after she  
4 began cooperating with the government. While she was a  
5 cooperating witness for the government in the Eastern District  
6 of New York, they continued to send her drugs, she continued  
7 to sell them, and she continued to send back drug proceeds  
8 money to Guyana. I was very interested in having Shoo Loo or  
9 one other individual tape-record a conversation with Alicia,  
10 showing that she in fact was still trafficking, selling drugs,  
11 so that I can use that for Mr. Khan's benefit at a later  
12 point.

13 Q So, was there information that you were going to follow  
14 up in connection with Alicia --

15 A Yes.

16 Q -- Jagnarain?

17 A Yes.

18 Q Could you look at page nine. I have it up there  
19 under "Guyana follow-up." Can you explain those entries that  
20 are highlighted in yellow?

21 A We had learned that she had married both Dave Persaud --  
22 Alicia Jagnarain -- and she had also married a fellow named  
23 Shen Jackson, and we were trying to see if any official  
24 documents might demonstrate she was a bigamist and had  
25 committed fraud in states in the United States.

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1 Q Explain to the jury why you wanted to know whether the  
2 woman was a bigamist or committed fraud. Explain that to the  
3 jury.

4 A Well, one of the areas that a Court might allow you to  
5 ask about on cross-examination is somebody who had lied under  
6 oath in the past. Generally, when you fill out applications  
7 saying that you have been previously divorced or you've never  
8 been divorced or you want a marriage license, often they have  
9 an oath attached to the documents. We wanted to determine if  
10 Alicia Jagnarain had lied under oath on those documents, to  
11 use in cross-examination.

12 Q Was this initial information about Alicia in connection  
13 with this trip to Guyana in 2007?

14 A Yes.

15 As you said in that prior page, I was talking about  
16 preparing a script for Shoo Loo to use when he called her to  
17 talk to her.

18 Q Explain what a "script" means in this context? That's  
19 right. Withdrawn?

20 Here it says, on page nine, right there, "Script for  
21 Shoo Loo"; right.

22 A Yes.

23 Q Shoo Loo is a friend of Alicia's?

24 A A drug-dealer friend.

25 Q What's the idea of the script?

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1 A He told us that he could contact her and do another drug  
2 deal. He had been continuing to do drug deals with her. We  
3 wanted him to do that, but we wanted it recorded, because he  
4 was never going to come to the United States to testify that  
5 he was a drug dealer and was engaging in drug deals.

6 Q What would happen if he came to the United States?

7 A He would be arrested. So, Mr. Gonzalez and I agreed that  
8 when we returned to the United States, we would send him  
9 recording equipment back to Guyana, have him attempt to  
10 contact Alicia Jagnarain, and attempt to sell her some drugs  
11 under a controlled delivery.

12 (Continued on next page.)

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1 bY MR. SHARGEL:

2 Q Did you ever do that, did you ever send a tape recorder  
3 to Guyana?

4 A We di d.

5 Q For Shoo Loo?

6 A For Shoo Loo, but the recording never occurred.

7 Q Why not?

8 A Apparently they were unable to reach her at that point.

9 Q There is other information on page 10 of this document  
10 under Al i c i a. Are we still talking about Al i c i a Jagnarain?

11 A Yes.

12 Q What is the purpose of recording this information with  
13 the bullet points that you were making on or near when you  
14 were hearing it, at the time of hearing it?

15 A I wanted to recognize them so I could potentially  
16 investigate them together with Mr. Gonzalez and members of my  
17 staff.

18 Q When you made memos like this, did you share this with  
19 others?

20 A I shared it with Mr. Gonzalez and I shared it with --  
21 this and other memos I would share with the other co-counsel  
22 in the case.

23 Q Di armui d Whi te?

24 A When Mr. Whi te came on, he was given copies of these  
25 documents. When Mr. Josh Dubi n came on he was given copies of

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1 these documents. Every investigator who participated in the  
2 case in the New York area was given copies of these documents.  
3 We had three in the New York area alone.

4 Q When you have the entry highlighted in yellow, Wired  
5 money for father's business that she stole, in capital  
6 letters. Got loans from Dave. Interest reflected in ledger.  
7 Just give us a very brief -- this is something you learned on  
8 this trip in October of 2007, right?

9 A Yes.

10 Q Give us a very brief idea of what information that  
11 imparts.

12 A We found out that the way Alicia Jagarain was committing  
13 additional crimes while cooperating with the government was to  
14 money launder. She would send money back to her parent's  
15 business, which was called Jag Enterprises, and by wiring it  
16 into their account, she thought she was hiding the source of  
17 the drug monies.

18 So we were interested in tracking, if we could, the  
19 delivery of money, whether by cash or wire, to her parent's  
20 business accounts. And we knew from having reviewed the  
21 ledger, that drug ledger back in New York, and having a copy  
22 with us in Guyana, that she was making notations about the  
23 interest on the money in the ledger.

24 Q There are more pages of this document. There is  
25 reference to Alicia again on this page. Where were you

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1 getting this information from?

2 A Drug dealers who had worked with Alicia Jagnarain and  
3 continued to work with her after her cooperation.

4 Q Finally, looking at page 12, that document.

5 A Yes.

6 Q More information about Alicia; is this from one source or  
7 several sources?

8 A I met with approximately 40 people while I was in Guyana  
9 during that first trip. This comes from a dozen or more of  
10 the people who had had dealings with Alicia, including her  
11 best friend, Dione Coates.

12 Q During the time you were in Guyana where were these  
13 interviews taking place?

14 A They took place mostly in the hotel I was staying at,  
15 which was called the Pegasus Hotel. Some were taking place at  
16 the government offices in Guyana, and I think a couple took  
17 place at one person's home, I don't recall what her name was.

18 Q Now, sir, do you remember anyone being kidnapped and  
19 brought to you to be interviewed?

20 A I would be in the hotel lobby. People -- I was generally  
21 sitting with Mr. Gonzalez, and Mr. Pereria, and Mr. Rodriguez.  
22 People would come to the hotel, park their cars in the parking  
23 lot, come in, speak to me, leave. Other people would show up.

24 We were trying to schedule times for people to come,  
25 so it wasn't like they were all there at once. When I drove

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1 to the person's house where I met the three or four people,  
2 they came at different times and left at different times.  
3 Some of them I never got to interview because they didn't want  
4 to wait around.

5 Q When you did these interviews were you less than cordial  
6 to the people who you were interviewing?

7 A I was trying to be very cordial.

8 Q Were you any different than you are right now sitting on  
9 the witness stand?

10 A I try to be the same all the time depending on the  
11 audience I'm dealing with though. I mean, there are people  
12 who are -- I would meet drug dealers who I may talk  
13 differently than I would talk to the head of the Guyanese  
14 government.

15 They talk differently. They use words that are  
16 nasty, they say things that are nasty. You speak their  
17 language so that they can understand you and you can  
18 understand them. Of course a lot of times I didn't understand  
19 much of what they said because I didn't understand the  
20 dialect.

21 Q One question before we leave this document. The second  
22 highlighted part says Alicia continued after Dave's death.  
23 What does that mean?

24 A That was a reference to the fact that she was continuing  
25 in the drug trafficking after Dave Persaud had died. Dave

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1 Persaud, while out on bail, had fled the United States on  
2 December 24, 2003 -- although he was cooperating -- went back  
3 to Guyana and was killed in October of 2004.

4 He had been sending the drugs to Alicia when he went  
5 back to Guyana, I was told, and after his death she continued  
6 with a guy named Danny Ronchurjee and others.

7 Q Did anyone tell you, while you were in Guyana in January  
8 of 2007, that the Phantom Gang killed David Persaud, anyone  
9 tell you that?

10 A No.

11 Q Did anyone tell you when you are were in Guyana whether  
12 David Persaud was killed by Roger Khan; anyone say it was  
13 Roger Khan who did it?

14 A No, actually I asked him to take me to the place where  
15 David Persaud was killed and to look at, the Palm Court. I  
16 spoke to the owner. I asked him what he knew about it. On a  
17 subsequent trip to Guyana, I spoke to the person who actually  
18 killed Dave Persaud.

19 Q Did visiting the scene of thing alleged crime part of  
20 what a defense lawyer does?

21 A It is. I didn't know whether or not Dave Persaud's  
22 murder would figure in Roger Khan's trial at that point -- it  
23 wasn't charged -- but as long as I was in Guyana, I wanted to  
24 be there, I wanted to take pictures, I wanted to be able to  
25 speak to people, get contact numbers for the future.

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1 Q One more question about Guyana in 2007. Did you find  
2 that this was a dangerous place where your safety was risk?

3 A Extraordinarily.

4 Q Describe the circumstances, tell us what you saw down  
5 there.

6 A While none of the people I was around, that is Mr.  
7 Rodriguez or Mr. Pereria, or many of the others I met had  
8 weapons, nor did Mr. Gonzalez have a weapon, we were very  
9 concerned and we were watching ourselves at all times.

10 There was one incident, not on this trip but on the  
11 next trip, the week before I got back to the hotel, the Buxton  
12 gang had come in and killed people in the hotel lobby. We  
13 were worried.

14 Q After your trip to Guyana in 2007, did you expand the  
15 investigation in any way?

16 A Substantially.

17 Q Tell us how that occurred.

18 A I began to hire additional investigators to perform  
19 distinct tasks around the United States. We were looking to  
20 develop evidence to support the contention that Roger Khan had  
21 a relationship with the FBI through 2003 at a time when the  
22 United States government was charging him with having sold  
23 drugs to the United States.

24 Through one of my investigators, Charles Avakian,  
25 who was an ex-FBI agent, we established a liaison with the FBI

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1 agents who had actually gone to Guyana and I began to have a  
2 running e-mail and telephone dialogue with those agents who  
3 confirmed to me that Roger Khan had indeed helped them.

4 Mr. Avakian was also sent on other distinct tasks to  
5 obtain handwriting samples. We hired investigators across the  
6 country between then and the beginning of 2008.

7 Q Any tapes that needed to be listened to?

8 A In, I would say, the end of February of 2007, beginning  
9 of March, the prosecutors in the Khan case provided us with a  
10 little more than five thousand conversations from a wiretap  
11 which was called the Sharwin Lilly wiretap.

12 Lilly had been a drug dealer who had been arrested  
13 in April 5, 2005, along with many other people, and the way  
14 they had arrested him and the other people was that they had a  
15 wiretap on his phone. They were listening in to his  
16 conversations bringing drugs into the United States.

17 We were told out of an abundance of caution, even  
18 though it didn't directly relate to Roger Khan, the  
19 conversations were being turned over to us. I then assigned a  
20 member of my staff, Miss Irving, to take care of listening to  
21 the tapes on the wiretap.

22 Q Interrupting the chronology for a moment. I want to put  
23 before you and the jury what has been marked in evidence as  
24 Government Exhibit 120.

25 Now, that is the copy room in your office; correct?

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1 A In 2008, correct.

2 Q You're no longer in that office, but this is in 2008.

3 The day you were arrested, September 10, 2008, this was your  
4 copy room, right?

5 A Correct.

6 Q And on the right side, or actually a little toward the  
7 top we have this equipment, the laptop that we have heard  
8 testimony about, right?

9 A Yes.

10 Q And we have the base that's underneath it?

11 A Correct.

12 Q We'll get to it later, but was the base plugged in, in  
13 any way or operating in any way?

14 A No.

15 Q But next to the equipment is this book, what appears to  
16 be a book, and it says on it, Lilly Wiretaps. Were the Lilly  
17 wiretaps -- is that a book? Let's go with that proposition.

18 A It's a binder that we -- one of the binders we were using  
19 to put materials in that related to the Khan case. One of the  
20 things we were reviewing were transcripts, either that we had  
21 prepared or my client had prepared, or that the government had  
22 provided to us.

23 We were putting three holes through and putting them  
24 into binders. This particular binder here was of some of the  
25 conversations, some of the transcripts from the Lilly wiretap



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1 on the 347 228-4022 number.

2 Q Do I recognize that number as the number that was  
3 referred to earlier?

4 A That's the number the government admitted to us that  
5 there was another Shortman on.

6 Q And does this collection of documents right here, Lilly  
7 Wiretaps with the number, does that have any relation to the  
8 equipment that is next to it?

9 A No. We were keeping documents that we finished working  
10 on in the copy room because it was also a file room.

11 Q So there is no connection, those are transcripts that are  
12 sitting there, right?

13 A Just transcripts.

14 Q Now did you take other trips to Guyana in 2007?

15 A I did. I travelled twice more to Guyana in 2007. I went  
16 in April of 2007 and I went again in October of 2007.

17 Q There is conversation on the recorded conversations with  
18 Mr. Vaughn where you express frustration about the cooperation  
19 you're not getting down in Guyana; correct?

20 A I do say that to him.

21 Q And was it true?

22 A In part.

23 Q Tell us the part that was true and tell us the part that  
24 wasn't true.

25 A The part that was true there were times when I would go

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1 to Guyana, we would work hard for three days, myself and my  
2 investigators, Mr. Pereria, Mr. Rodriguez and others. We  
3 would put in 16, 17, 18 hour days on the three or four days I  
4 would be there.

5 I would be promised by various people, including the  
6 head of the Chamber of Commerce of Guyana, retired general,  
7 Brigadier General Norman -- I've forgotten the last name --  
8 McClean and others that they would get me documents shortly or  
9 after I left or before I left, and after I would leave Guyana,  
10 many of those tasks fell by the wayside, didn't get completed.

11 Q You said a moment ago that it was partly true. What is  
12 the part that wasn't true?

13 A I was also trying to persuade Mr. Vaughn to maybe be more  
14 accomplished, get more done than his counterparts, Mr. Pereria  
15 and Mr. Rodriguez in Guyana, spur him on to more vigorous  
16 pursuit. They were not the most aggressive group of people I  
17 had met.

18 Q One trip was in April of 2007?

19 A That's correct.

20 Q And do you remember generally what you learned or what  
21 you accomplished on that trip?

22 Again, I'm asking only from what you were told  
23 during this trip in April of 2007, what you heard about this  
24 investigation.

25 A By this point we were starting to focus not only on

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1 Alicia Jagnarain but as well on David Clarke. The reason we  
2 were focused now a lit bit more on David Clarke was, in  
3 listening to the Lilly wiretaps, we learned, even though it  
4 wasn't indicated on the government's transcripts, we learned  
5 that one of the people who was sending drugs to Lilly was  
6 David Clarke.

7 So I wanted more information on David Clarke since I  
8 had heard his name back in the January '07 meeting in Guyana  
9 to try to demonstrate that he was an enemy of Roger Khan's and  
10 therefore they couldn't be together in a drug conspiracy.

11 Q Let me show you what has been marked for identification  
12 as Defense Exhibit S305C. Before you look at that, let me put  
13 one question to you. Did you prepare a memo in connection  
14 with this trip as well?

15 A I did.

16 Q Did you include a list of things that you were going to  
17 do down there and then the results of that effort?

18 A Yes, I put down what I wanted to cover and I would add in  
19 on my computer what I was accomplishing.

20 Q And looking at Defense Exhibit S305 C, do you recognize  
21 what that is?

22 A That is the memo I prepared of that trip.

23 Q It's an accurate reflection of what happened when you  
24 were down in Guyana?

25 A It was my notes to myself of what I was hearing.

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1 MR. SHARGEL: I offer it into evidence.

2 MR. D'ALESSANDRO: Same objection, your Honor.

3 THE COURT: Overruled. Received.

4 Same limiting instruction, ladies and gentlemen.

5 Understand what I mean by that?

6 (So marked.)

7 THE COURT: Go ahead.

8 BY MR. SHARGEL:

9 Q We first have on the first page things to cover in GT.  
10 GT is what, Georgetown?

11 A Georgetown.

12 Q That's where you were travelling, the capital of Guyana?

13 A That's correct.

14 Q Tell us some of the things -- I'm not going together over  
15 a lot of the pages -- tell us some of the things that were  
16 accomplished, looking at this first page?

17 A Well, my client had told me that Clayton Hudson was a  
18 drug dealer from Guyana with the name Shortman. We were  
19 attempting to get documents from prior arrests of Clayton  
20 Hudson in Guyana to show that in fact that was his nickname.

21 We were trying to get evidence from the Guyana  
22 police force and from an organization called CAMU, which was  
23 part of the narcotics enforcement group in Guyana. We wanted  
24 the videotapes that were shot in the airports of seizures of  
25 drugs, which would show us perhaps who the people were who

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1 were involved in the drug shipments and the manner in which  
2 they were shipping the drugs to New York.

3 Q I refer you to the next page.

4 A There is a reference as well there to Mr. Gouveia from  
5 the Chamber of Commerce who I met up with. When Roger Khan  
6 had been -- was named in a report in March of 2006, what was  
7 called the INCSR report that said he was a drug dealer and not  
8 a successful businessman, Mr. Khan had immediately asked for a  
9 meeting with the US ambassador to clear up the statement.

10 And he told me about the arrangements he had made to  
11 clear up this misstatement, in his view, and so I sought to  
12 meet with the people who set up the meeting with the US  
13 ambassador and with the US ambassador himself.

14 Q By the way, this says on page one right there, Clayton  
15 Hudson. Need some documentary proof that his name was  
16 Shortman. See that?

17 A Yes.

18 Q You didn't get anything from the government till  
19 September 4, 2008 that supported that, correct?

20 A Not fourteen, fifteen months later.

21 Q I show you page two of this document in evidence, just  
22 one reference, Boss Man is a cultural item. What did you  
23 learn that led you to write that down?

24 A I had learned on my prior trip, but I wanted to find  
25 witnesses who would be in a position to testify to that at a

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1 trial, and that was a reference to my meeting with Ravi Dev  
2 from the Parliament, and Randy DePoo, a member of the  
3 government at one time who I thought could be expert witnesses  
4 for us.

5 Q Going onto the next page. There's one attribution that I  
6 want to call your attention to now under miscellaneous. It  
7 says, highlighted portion says, Have to identify people who  
8 will be deposed rule 15. See that?

9 A Yes.

10 Q Could you tell us, Mr. Simels, what, as you understand  
11 it, rule 15 means.

12 A There is a process that is permitted to us under the  
13 rules which say that if you cannot get a person to come to the  
14 United States to testify, you can request of the court that  
15 they grant you the right to travel with the prosecution to  
16 that country and take the testimony of that person in that  
17 country and then show it by videotape or DVD here.

18 We believed that most of the people who would  
19 testify for Roger Khan, and would testify with regard to David  
20 Clarke and other -- and Alicia Jagnarain, would not come to  
21 the United States.

22 So I wanted to go through what I understood the  
23 process was, the information I needed to obtain from the  
24 witnesses to be able to ultimately put into some document I  
25 would submit to a court.

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1 Q Were you the only lawyer on behalf of Roger Khan who was  
2 working on this?

3 A No.

4 Q Who else?

5 A At this point Diarmuid White was working on the case. He  
6 was in charge of the legal writing and research. We had other  
7 attorneys who were assigned on the case from outside the  
8 office. I mentioned before Jack Semmelman, we had -- I'm  
9 trying to think of who else, Richard Levitt, some other  
10 lawyers.

11 Q So after you returned from Guyana in April of 2007, and  
12 you had this memo, what happened to the rest of the summer of  
13 that year?

14 A Well, we spent the time investigating. We were  
15 attempting to locate additional witnesses all over the United  
16 States.

17 We increased the number of investigators we were  
18 using to locate those people to ask them -- they weren't  
19 witnesses per se, but they were people with information,  
20 people, as Mr. Sessler testified, who might give us  
21 information that would be useful to use on Lilly.

22 We attempted to locate and did in fact locate Shen  
23 Jackson, Alicia's husband, and had an investigator interview  
24 him. As a result of that interview, he gave us information  
25 about Alicia we didn't have before, and I also started to have

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1 an e-mail dialogue and telephone dialogue with her husband.

2 Q Did there come a time in October of 2007 that you again  
3 went to Guyana?

4 A I did.

5 Q This was a third trip?

6 A Third trip.

7 Q Tell us what happened on the third trip.

8 A This trip was primarily for the purpose of getting the  
9 rule 15 in order. I met with the witnesses who were going to  
10 testify, got further information from them so we could put it  
11 into our physical application to the court.

12 We were continuing to investigate Alicia  
13 Jagnarain. We were continuing to investigate David Clarke. I  
14 was meeting with people like Major Edward Peters from the  
15 Army, I met with more members of the government, including  
16 Minister Ramsammy. I met with Clement Rohee, who was the  
17 Minister of Home Affairs. I attempted to see the chief of  
18 police but he did not meet with me.

19 Q At this point did you believe -- when I say this point,  
20 I'm talking about the trip to Guyana in October 2007 -- did  
21 you believe that David Clarke was going to be a witness  
22 against your client Roger Khan?

23 A No, nobody seemed to have an idea, the ones I spoke to,  
24 where David Clarke was. But we knew that -- from the Lilly  
25 wiretaps, we could hear Lilly get on the phone with David



Simels - direct/Shargel

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1 Clarke and David Clarke tell him I have my source of the drugs  
2 here. He's very upset that we lost these drugs.

3 So I knew that, since the prosecutors were  
4 maintaining that David Clarke was a coconspirator of Roger  
5 Khan's, and that Lilly was a coconspirator of Roger Khan's, I  
6 had to try to find a way to show the jury that David Clarke  
7 was not believable as to who his source was.

8 Q How were you permitted to do that if Clarke was not going  
9 to be a witness, you couldn't cross-examine him, right?

10 A There's another rule of law -- and I don't mean to say  
11 what specific language is -- but you can attack a witness'  
12 credibility through other people. I believe it's Rule 806, I  
13 could be wrong about the number, 804, one of those two.

14 Q Number aside, would this apply, would this rule as you  
15 understood it at the time apply to a person who was speaking  
16 on a tape but not present in court?

17 A Exactly.

18 Q Did you create a memorandum after your trip to Guyana in  
19 October 2007?

20 A I did.

21 Q Let me show you what is has been marked for  
22 identification as S305 B for identification, a two page  
23 document. Do you recognize this?

24 A I do.

25 Q What do you recognize it to be?

Simel s - di rect/Shargel

1273

1 A My notes that I made of the October trip to Guyana.

2 MR. SHARGEL: I offer this into evidence..

3 MR. D' ALESSANDRO: Same objection, your Honor.

4 THE COURT: Overruled. Received.

5 (So marked.)

6 MR. SHARGEL: May I publish it?

7 THE COURT: Yes.

8 Q We notice -- and this is true in the others as well --  
9 that this form that says interoffice memorandum has a to line  
10 to Khan. That to the file or to Khan himself?

11 A To the file.

12 Q RMS, from RMS; that's you?

13 A Yes.

14 Q This is October 2, 2007?

15 A Yes.

16 Q But it says Guyana October 7, 2007. How does that  
17 happen?

18 A Well, I would plan out my trip, what I wanted to  
19 accomplish. As I said I would add notes in as I went along.

20 Q For example, you say on the next line, locate immigration  
21 person, Paul Gerald.

22 A Right.

23 Q There is an entry on the next page to a Fineman. See  
24 that?

25 A Yes.

Simels - direct/Shargel

1274

1 Q Lives in Agricola and owns a red car 190. What is that  
2 about?

3 A Mr. Khan had asked me if I could locate an individual who  
4 he thought might be a good witness in the Rule 15 proceedings  
5 to testify.

6 He told me the person's name was Fineman from  
7 Agricola and that he owned a red car 190. He told me for  
8 purposes of description, when I spoke to Paul and to Gerry,  
9 that it was not Andrew Morgan, also known as Fineman.

10 Q Did you meet this Fineman on your trip in October of  
11 2007?

12 A I did not.

13 Q Did you look for him in October of 2007?

14 A I didn't.

15 Q Following the trip to Guyana in October of 2007, how did  
16 the investigation proceed?

17 A We continued along the same lines. We were looking for  
18 public records for any potential witness. We were checking  
19 the docket sheets.

20 Court records would indicate who was arrested and  
21 what was happening with their case. It's called a docket  
22 sheet. We would check to see who had pled guilty and had not  
23 been sentenced. That might give indication if they hadn't  
24 been sentenced to are a long time that perhaps they were  
25 cooperating with the government and if it was in a Guyanese

Simels - direct/Shargel

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1 case, we thought we would take a look at whatever was  
2 available about those people in case they turned into a  
3 witness in the Roger Khan case.

4 Q And what were you trying to accomplish by investigating  
5 these people who might turn out to be witnesses?

6 A Well, since we didn't have a witness list, we were just  
7 speculating as to who could potentially be a witness in the  
8 case.

9 We were trying to obtain as many records as quickly  
10 as we could so that when we finally did learn who the  
11 witnesses were, a week or so before trial, we would at least  
12 have files on each of these people.

13 Q And what was your understanding as to whether you were  
14 permitted to interview cooperators?

15 A The rule I believe is that you can interview cooperators.  
16 You can interview anybody in a case.

17 Q Anybody, what? Sorry.

18 A Any potential witness in a case, any potential sorts of  
19 information, anybody with knowledge.

20 Q As long as they are willing to talk to you?

21 A Yes.

22 Q During that trip or shortly after that trip to Guyana in  
23 October of 2007, did you learn anything about what we have  
24 been calling here the Panasonic notebook, the laptop?

25 A In October 2007?

Simel s - direct/Shargel

1276

1 Q Yes.

2 A Yes.

3 Q Tell us how that subject was introduced to you, what did  
4 you learn and from whom?

5 A One of the things Roger Khan had said to me was, I can  
6 provide you further proof that I was a sworn enemy of David  
7 Clarke's and that I would never have been his coconspirator.

8 Q When was this, let's take the time. Was this before you  
9 go to Guyana in October of '07 or after you come home?

10 A This was from the beginning but we really didn't begin to  
11 focus our attention on it until mid-2007.

12 Q Continue. The conversation with Roger Khan about the  
13 laptop.

14 A He said to me that when --

15 THE COURT: Excuse me.

16 Bear in mind, none of this can be considered by you  
17 as proof of the truth of what Khan, according do Simel s, said  
18 to Simel s.

19 Understood?

20 Sorry, Mr. Simel s.

21 THE WITNESS: Not a problem, your Honor.

22 THE COURT: Continue.

23 THE WITNESS: He said that when David Clarke was in  
24 Guyana and helping the Taliban in selling drugs with his  
25 brother Hupert, that he, Khan, had equipment that the

Simels - direct/Shargel

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1 government of Guyana had given to him to use to fight the  
2 criminals, which allowed him to intercept conversations in  
3 Guyana. And that on the intercepted equipment, at least on a  
4 laptop, there were conversations in which he had intercepted  
5 David Clarke engaged in wrongdoing.

6 His concept was, why would I be collecting  
7 information about David Clarke doing drugs and doing other bad  
8 things if I was his coconspirator, and you can show that to  
9 the jury and ultimately maybe they will think that is a reason  
10 why I was not involved with him.

11 (Continued next page)

12  
13  
14  
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23  
24  
25

Si mel s-cross-Shargel

1278

1 CONTINUING CROSS-EXAMINATION

2 BY MR. SHARGEL:

3 Q Did you follow that lead?

4 A I did.

5 Q What happened?

6 A Well, I started asking around among the people that  
7 worked for Roger Khan's companies, people who have been  
8 involved with Roger Khan, whether they were involved with the  
9 Taliban, knew where these laptops were. I met with a person  
10 at the Guyana telephone and telegraph, Jerry, to find out how  
11 that system worked. He told me no longer functional system,  
12 no longer using analogue. He said to me he thought the  
13 equipment was in the possession of a fellow Sham Bierball.

14 Q Did you get in touch with him?

15 A We did.

16 Q What happened?

17 A He said he didn't have it.

18 Q Where does this ultimately go?

19 A We went from source to source. The day I was about to  
20 leave to go home from Guyana, I was told they had located a  
21 laptop, that is Jerry and Paul, Gerry Pereria and Paul  
22 Rodriguez. When they swung by the hotel, they told me they  
23 had the laptop. I told them I wasn't carrying their laptop,  
24 my laptop in my briefcase or home, we went to a Federal  
25 Express office where it was mailed.

Simel s-cross-Shargel

1279

1 Q Fed Ex to the United States to your office?

2 A Turned out there were two laptops, a small one and a  
3 bigger one.

4 Q Did you think for a moment these laptops could record a  
5 conversation?

6 A No, I've been told quite to the contrary by this fellow  
7 from GT and T, also been told none of this equipment had  
8 worked in years by the persons who operated it.

9 Q When you get the laptops back to the United States, what  
10 steps did you take to find out what's in them?

11 A I actually took almost no steps until around January of  
12 2008. They sort of sat in a room. We couldn't get into them.  
13 We tried to do it, went to the client, asked him if he knew  
14 what the password was. He said no. On an occasion when one  
15 of our IT people who service our computers was in the office,  
16 John Conti, I asked him if he knew a way to break into the  
17 larger laptop so that we could see what information was on the  
18 laptop.

19 Q You say break in, does that mean get past the password?

20 A Get past the password. People have a methodology they  
21 can use or a program where they can go past the password  
22 that's in there and open it up anyway, whether with an  
23 administrative password.

24 Q Did that come about, the IT -- what's his name?

25 A John Conti, C O N T I.



Simel s-cross-Shargel

1280

1 Q Would he be able to get into the laptop?

2 A Ultimately the one I asked him to, the larger one.

3 Q What did you discover?

4 A There was a list of targets, I say target list on the  
5 screen, tape recordings of David Clarke and others who the  
6 government were claiming were Roger Khan's coconspirators in  
7 the drug case, who apparently were Roger Khan's enemies.

8 Q Just to make it clear, at any time that you had the  
9 equipment in your office, whether it be the laptop, talk about  
10 the base later, when you had the equipment in the office, were  
11 you wiretapping anyone?

12 A I never touched that equipment, never wiretapped anybody.  
13 We never sought to get the appliances you need to wiretap  
14 anybody. We just thought they were laptops.

15 Q Did you ever turn it on to see if it worked? I'm not  
16 talking about the laptop, but the base. Did you ever turn it  
17 on?

18 A I didn't have a base at that point.

19 Q I understand. When you ultimately got the base, I'll  
20 stay with this subject, did you ever try to turn the base on?

21 A If I was told the base was there and I don't recall being  
22 told that, but I was told I didn't try to turn it on.

23 Q I'll direct your attention to early 2008, the period,  
24 say, between January and May. What were you doing in  
25 connection with this case?

Si mel s-cross-Shargel

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1 A 2008?

2 Q 2008.

3 A We had now gathered the information we needed to make  
4 that application to the court, what was called the Rule 15  
5 application. I prepared an affidavit together with my  
6 cocounsel Darmuid White. We submitted that to the court and  
7 asked the court to grant us the opportunity to depose, I  
8 believe initially, eight or nine people.

9 Q When you submitted the affidavit to the court for the  
10 Rule 15 depositions, did you discuss the topic of David  
11 Clarke?

12 A There were two topics basically being discussed in the  
13 Rule 15. The first topic was getting witnesses who would  
14 testify negatively, adversely, against David Clarke; that is  
15 to say, he was a bad person, hated Roger Khan, supported the  
16 Taliban in Guyana, so forth. The second person we wanted  
17 evidence on was Alicia Jagnarain, depose two witnesses in  
18 Guyana with regard to Alicia Jagnarain. We provided copies of  
19 the applications to the U.S. Attorney's Office and to the  
20 judge.

21 Q How do you actually get this information before the court  
22 and the United States Attorney's Office?

23 A There's a document that was prepared that has an  
24 affidavit, called an affirmation in which I lay out  
25 specifically for each person what I think they'll testify to

Si mel s-cross-Shargel

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1 if the judge grants permission for us to go to Guyana to take  
2 their testimony.

3 There are rules as to what circumstances a judge  
4 will permit that or not. A judge has to decide it's relevant  
5 to the proceeding, necessary to the proceeding, and so we do  
6 that. We also submitted our position on why the law required  
7 the judge to do it.

8 Q The affirmation that was submitted by you was submitted  
9 in early 2008?

10 A Somewhere in January, 2008, mid-January.

11 Q Did this document specifically mention your interest in  
12 discrediting David Clarke?

13 A Absolutely.

14 Q Did it specifically mention your interest in discrediting  
15 Alicia Jagnarain?

16 A Yes.

17 Q Let me show you what's been marked for identification as  
18 Defense Exhibit S 309-A: you see that document?

19 A Yes, I do.

20 Q What do you recognize it to be?

21 A A copy of the affirmation submitted to Judge Irizarry and  
22 the U.S. Attorney's Office in connection with my application  
23 for Rule 15, the opportunity to conduct Rule 15 deposition.

24 Q Looking at the last page of this, this document is not  
25 signed, correct?

Si mel s-cross-Shargel

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1 A Correct.

2 Q Does not actually bear your signature?

3 A Correct.

4 Q Do you know where this document was taken from?

5 A I believe it was taken -- I think it was taken off my  
6 computer, perhaps, but when we file matters now in the court,  
7 we do them electronically rather than physically bringing them  
8 over with our signature. We send them with like SS to the  
9 court so that we scan a document in, electronically file it.

10 Q Did you in fact physically sign this document?

11 A I'm sure I did for Mr. White and he submitted it to the  
12 court.

13 Q Was this actually -- you anticipated my question. Was  
14 this actually submitted to the court?

15 A Yes.

16 Q Was this actually given not to these prosecutors here in  
17 this case, but was this affidavit actually served upon the  
18 United States Attorney's Office?

19 A And copied to the judge and Clerk of the Court.

20 Q Was there any secret about your interest in discrediting  
21 David Clarke?

22 A I've been talking about David Clarke and Alicia Jagnarain  
23 in court for a year and a half at that point.

24 Q Both Alicia Jagnarain and David Clarke are in this  
25 affidavit?

Si mel s-cross-Shargel

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1 A Correct.

2 MR. SHARGEL: I offer it into evidence.

3 MR. D' ALESSANDRO: No objection.

4 THE COURT: Received.

5 (So marked.)

6 Q We won't go through the whole thing. There are two or  
7 three places I would like to stop if I may.

8 Page two. It says although the government has not  
9 disclosed, and has not been required by the court to disclose,  
10 the identity of any alleged coconspirators, counsel has been  
11 able to identify certain individuals as possible  
12 coconspirators from discovery provided by the government and  
13 from investigation derived from that discovery. In other  
14 words, when you get discovery, you follow up on it, is that a  
15 fair statement?

16 A Yes, every piece of document we would get from the  
17 prosecutors we try to analyze it, follow up with our  
18 investigators.

19 Q To the extent the government will call such individuals  
20 as witnesses at trial, or will offer their statements as  
21 co-conspirator declarations -- we don't need technicalities  
22 like that, or otherwise offer such evidence of such  
23 individuals, coconspirators, the defendant must be prepared to  
24 counter that evidence and to impeach the alleged  
25 coconspirators if their testimony or statements are offered,

Si mel s-cross-Shargel

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1 you see that?

2 A Yes.

3 Q Then you say, this is under oath, isn't it?

4 A Yes, sir.

5 Q You're swearing to the content?

6 A That's correct.

7 Q I anticipate that the prosecution will contend at trial  
8 that one David Clarke, hereinafter Clarke and his brother  
9 Hubert Clarke, conspired with Khan to import cocaine into the  
10 United States, you see that?

11 A I do.

12 Q That's what you wanted to discredit?

13 A That's correct.

14 Q On page four I have reviewed discovery and other  
15 information relating to Lilly, that's correct?

16 A Yes.

17 Q Including numerous tape recorded conversations  
18 intercepted over Lilly's telephone pursuant to authority of  
19 law. Based on my review of the discovery, I anticipate that  
20 the prosecution will contend at trial principally, but not  
21 exclusively, through coconspirator statements that Khan was a  
22 coconspirator of Clarke in Guyana and consequently a  
23 coconspirator of Lilly. My review has shown that any such  
24 testimony and statements implicating Khan in any Clarke/Lilly  
25 conspiracy will be completely uncorroborated.

Simel s-cross-Shargel

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1           You go on to say it remains to be seen whether  
2 Clarke himself will be a prosecution witness, right?

3     A     Yes.

4     Q     What you're attempting, if I shortcut this, what you're  
5 attempting to do here is to put on witnesses in Guyana to  
6 testify at deposition that would attack the credibility or  
7 believability of David Clarke, right?

8     A     Correct.

9     Q     Same thing and I don't have to go reading it, on page 12,  
10 same thing with respect to Alicia Jagnarain, right?

11    A     Yes.

12    Q     Even though you didn't have a witness list, you were able  
13 to discover who the witnesses were and you're telling Judge  
14 Irizarry, a federal judge in this building that you want to  
15 impeach those people with other witnesses, right?

16    A     That is correct.

17    Q     Did you ever, ever, make any effort to conceal your  
18 investigation of David Clarke or Alicia Jagnarain?

19    A     At no point.

20    Q     References has been made to Nigel Rodney and your  
21 understanding that Nigel Rodney was a cooperator. Did you,  
22 sir, ever visit Nigel Rodney in a federal jail?

23    A     I've always believed Rodney to be one of the principal  
24 witnesses against Roger Khan. Yes, we did visit him at the  
25 jail.

Simel s-cross-Shargel

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1 Q Which jail did you visit him at?

2 A Went to what's called the MDC, which is the federal  
3 prison in Brooklyn New York on 39th Street.

4 Q 29th Street you mean?

5 A 29th Street.

6 Q And 3rd Avenue, correct?

7 A That's correct.

8 Q A place you've been to many times?

9 A Many times.

10 Q You knew that Nigel Rodney had a lawyer, right?

11 A I did.

12 Q But you went there anyway without actually contacting the  
13 lawyer?

14 A We attempted to contact the lawyer numerous times, never  
15 reached him, ultimately went to see Mr. Rodney after he sent a  
16 message to me he wanted to talk to me.

17 Q What's your understanding of the law in this court as to  
18 whether an individual is permitted to go to see --

19 MR. SHARGEL: Should I finish the question.

20 THE COURT: He's waiting.

21 MR. SHARGEL: I thought he was leaving.

22 MR. D'ALESSANDRO: Staying here.

23 Q What's your understanding of whether a lawyer is  
24 permitted under the rules of ethics, the rules of law, any  
25 rules you want, permitted to see someone who is represented by



Simel s-cross-Shargel

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1 counsel without actually notifying counsel?

2 A My belief you can absolutely do it.

3 MR. D'ALESSANDRO: Objection.

4 THE COURT: Overruled.

5 Q There's authority for that in this circuit, Court of  
6 Appeals has said that's correct?

7 A I believe a 1994-case decided by the United States Court  
8 of Appeals for the Second Circuit that says just exactly that.

9 Q Did you, sir, ever get a chance to sit down and talk to  
10 Nigel Rodney?

11 A I did.

12 Q You went into the MDC, filled out a form, we've seen it  
13 on the screen, Title 18 as Mr. Rodriguez said as a  
14 representative from MDC, you remember him from yesterday?

15 A Yes.

16 Q You filled out the form, did you?

17 A I did.

18 Q Did you say anything false or make any false statement to  
19 get in to see Nigel Rodney?

20 A No.

21 Q Tell us what happened when you went there.

22 A Went to the MDC, you walk up to the front desk. The  
23 guard or correction person says how many forms you want,  
24 counselor? You tell him how many you want. You fill them  
25 out, put your things in a locker, give them back the forms.

Simel s-cross-Shargel

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1 They call the inmates down. You go to the visiting room and  
2 the person comes down. In this instance, Mr. Rodney came  
3 down. He goes over to a desk where there are generally two  
4 correction officers standing. He asked --

5 Q The bottom line you see him?

6 A I do see him.

7 Q Are you with someone?

8 A I'm with Mazurek.

9 Q The two of you get to see him?

10 A Yes.

11 Q Does he say I don't want to talk to you, leave, anything  
12 like that?

13 A No, we went into an attorney room, a glass room where we  
14 sat and talked for about 45 minutes or so.

15 Q After you left, did you prepare a memorandum of that  
16 interview?

17 A Yes.

18 Q Did you --

19 A I believe Ms. Irving prepared.

20 Q Did you learn information helpful to your case?

21 A Very helpful.

22 Q I show you what's been marked as S 306-A for  
23 identification. I'm showing you what's been marked as S 306-A  
24 for identification. I ask you to look at that and tell me if  
25 you recognize it.

Simel s-cross-Shargel

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1 A I do.

2 Q What do you recognize it to be?

3 A A memorandum of the first meeting Ms. Irving and I had  
4 with Sharwin Lilly, also known as Rodney Nigel Chester on  
5 March 9th, 2008.

6 Q You received a copy of this, did you?

7 A I did.

8 Q Did this accurately reflect what occurred at the meeting  
9 on March 9th, 2008?

10 A I believe it did.

11 Q Was it your understanding this was prepared near the time  
12 or not immediately thereafter, shortly thereafter?

13 A Yes.

14 MR. SHARGEL: Offer this into evidence.

15 THE COURT: Any objection?

16 MR. D'ALESSANDRO: No, your Honor.

17 THE COURT: Received.

18 (So marked.)

19 THE COURT: Again, even if you find these  
20 statements were in fact made to Mr. Simel s, you can't consider  
21 them for the truth, understood?

22 Go ahead, Mr. Shargel .

23 Q This simply says RMS and I met with Lilly. He was  
24 advised that he did not have to meet with us and that he was  
25 free at any time to leave. He agreed to listen and talk to us

Simel s-cross-Shargel

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1 about his involvement in Roger's prosecution. Lilly said he  
2 didn't know he was going to be testifying against Roger, and  
3 only two weeks ago was he asked by the government what he knew  
4 about Roger. Lilly said if he testified he would say he has  
5 never met Roger and does not know him. He said that he didn't  
6 know he was working with Roger but only believed it because  
7 Dun-Dun and Shelly said. He said stuff only gets out of GT if  
8 they go through Clay, Ricardo and Roger B/C, that is what  
9 Dun-Dun and Shelly told him. Is that what was told to you?

10 A Yes.

11 Q He was willing to talk about the entire subject?

12 A He was and he did.

13 Q Did there come a time when there was a return trip to the  
14 MDC?

15 A Mr. Rodney indicated at a point in the conversation that  
16 he wanted to think about what we had been discussing and  
17 wanted to talk to his attorney and that we should return, I  
18 believe, the following Friday.

19 Q Did you return the following Friday?

20 A We did the following week; yes, sir.

21 Q Let me show you what's been marked for identification as  
22 S 306 B. I ask you if you recognize this?

23 A The memorandum of the visit on March 14th, 2008 to  
24 Mr. Rodney.

25 Q Was this memorandum prepared, if not immediately, then

Simel s-cross-Shargel

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1 shortly thereafter the meeting?

2 A I would think that same day.

3 Q Does it accurately reflect what happened at the meeting?

4 A Yes.

5 MR. SHARGEL: Offered in evidence.

6 THE COURT: Received.

7 (So marked.)

8 MR. SHARGEL: I want to point out two attributions.

9 Lilly says he didn't know Roger and only knew rumors. He said  
10 the rumors were that Roger blew up in Guyana but it was after  
11 Lilly had left Guyana for the U.S. Lilly said he told the  
12 government he didn't know Roger and only heard of Roger  
13 through Dun-Dun. You sigh that.

14 A Yes.

15 Q Two pages later, this is still before you received a  
16 letter from the government conceding there was another Short  
17 Man involved in drugs, right?

18 A Another five minutes later.

19 Q When asked if Lilly knew Clay by any other name, Lilly  
20 said yes, Short Man, and it says without any hesitation,  
21 right?

22 A Yes.

23 Q By the way, when you met with Nigel Rodney, did you try  
24 to intimidate him, scare him in any way?

25 A Mr. Rodney was free to leave at any time. There were, as

Si mel s-cross-Shargel

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1 I say, two correction guards within 50 feet of us. He could  
2 have walked out that door any time and never come back, gone  
3 upstairs, told the government we were seeing him, done  
4 whatever he wanted to do.

5 Q Did you ever have any cross-words with him, anything like  
6 that?

7 A No.

8 Q Any voices raised?

9 A No, we had a very conversational discussion.

10 Q There were three other times Mr. Rodney was interviewed?

11 A Yes.

12 Q You weren't present in those three other times?

13 A I don't believe I was.

14 Q Arienne Irving went to see Nigel Rodney, obtain  
15 information from him?

16 A I asked Irving on page three occasions to go to continue  
17 dialogue, get him to speak, to continue.

18 Q Did you talk to Ms. Irving immediately after she came  
19 back?

20 A She would call me as she was leaving the prison.

21 Q Did you see the memos shortly after they were prepared?

22 A As soon as they were prepared.

23 Q Could you tell the court how long it was between  
24 Ms. Irving's returning to the office that day and when these  
25 memos were prepared?

Si mel s-cross-Shargel

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1 A Ms. Irving would generally come right back to the office  
2 and would type up the memorandum, have them before the end of  
3 the day.

4 Q You would get to read the memorandum by the end of the  
5 day?

6 A Yes.

7 Q I show you what's been marked as Defense Exhibit S 306  
8 for identification, 306-C for identification. I ask you if  
9 you recognize it?

10 A That's the third visit to Nigel Rodney/Sharwin Lilly  
11 visit.

12 Q Did you read this on May 20th, 2008?

13 A I would think so.

14 MR. SHARGEL: Offered into evidence.

15 THE COURT: Any objection?

16 MR. D'ALESSANDRO: None.

17 THE COURT: Received.

18 (So marked.)

19 Q There was a fourth visit to Mr. Rodney, correct?

20 A Yes.

21 Q That fourth visit was by Ms. Irving?

22 A Yes.

23 Q Same circumstances where you got a memo upon her return?

24 A Yes.

25 Q Prepared either immediately or shortly after she

Si mel s-cross-Shargel

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1 returned?

2 A Yes.

3 Q You read the memo on the same day it was prepared?

4 A Yes.

5 Q I show you what's been marked for identification as  
6 306-D, ask you if you recognize that, tell me what it is?

7 A This is a memorandum of the fourth visit I sent  
8 Ms. Irving back because Mr. Rodney had promised me he would  
9 get me the telephone number for his cousin for me to call in  
10 Guyana for my trip to Guyana who was related to the Clarkes.

11 MR. SHARGEL: Offer 306 D in evidence.

12 THE COURT: Any objection?

13 MR. D'ALESSANDRO: No objection.

14 THE COURT: Received.

15 (So marked.)

16 Q I'm going to turn to one page, two entries, one page.  
17 Lilly said he didn't like that David Clarke is cooperating.  
18 He wants info on how he was arrested. He said that David  
19 never does anything that doesn't benefit himself.

20 Further --

21 THE COURT: Again, ladies and gentlemen, you cannot  
22 consider these for proof of the truth of the matters asserted,  
23 understood?

24 Q Lilly said at his last proffer, the one he told us about,  
25 he met Shannon Jones for the first time and she said -- one



Simel s-cross-Shargel

1296

1 of the prosecutors?

2 A In the Khan case.

3 Q The first time she said Lilly knew Roger and Lilly said  
4 he didn't and she was wrong. She then showed him a big photo  
5 book and asked him to go through it to see if he recognized  
6 anyone. He said he went through it and he said he didn't know  
7 anyone. But Lilly said he knew Roger's photograph was in  
8 there, B/C. You had this information with you as of May 22nd,  
9 2008, correct?

10 A That's right.

11 Q Finally, I would like to show you -- do you remember  
12 there was yet another visit, one more visit to Nigel Rodney?

13 A I believe in July of 2008.

14 Q Let me show you what's been marked as Defense Exhibit?  
15 306 E for identification, ask you if you recognize this  
16 document?

17 A I do.

18 Q What do you recognize it to be?

19 A This is Ms. Irving's memorandum to myself in the Khan  
20 file with regard to Nigel Rodney and her visit on July 22nd.

21 Q Was this prepared immediately after or close to  
22 immediately thereafter and did you read it on July 22nd, 2008?

23 A Yes.

24 MR. SHARGEL: Offered into evidence.

25 THE COURT: Received.

Si mel s-cross-Shargel

1297

1 (So marked.)

2 Q I'm not going to read it, it's in evidence. This  
3 reflected as you understood it what occurred at that meeting?

4 A Yes.

5 Q This was the fifth visit, the fifth time that Lilly was  
6 visited, correct?

7 A Correct.

8 Q When I say Lilly, this is Exhibit,  
9 Government Exhibit 120, this is the same Lilly who is the  
10 subject of the wiretaps, right?

11 A That's right.

12 Q There's a fair amount of information for Lilly to impart?

13 A A lot, yes.

14 Q Let me move on to another event in early 2008; that is,  
15 the visit to see Clarke. After the meetings with Lilly, the  
16 information imparted to you, did your view change on whether  
17 Clarke was going to be an actual witness as opposed to a  
18 declarant on paper?

19 A Yes, but I learned, I believe on March 9th, 2008 from  
20 another inmate, not Lilly, that Clarke might likely be at the  
21 Queens detention center. So, we attempted to confirm that  
22 information.

23 Q What did you do?

24 A One thing you could do, you could go on the Bureau of  
25 Prisons' web site. If you have a person's name or date of

Simel s-cross-Shargel

1298

1 birth, inmate number, you can put that in, called the inmate  
2 locator, and they'll tell you where that person is if they're  
3 in the system. Mr. Clarke didn't show up that way.

4 We then decided -- I decided -- to have Ms. Irving  
5 call over to the specific prison but I didn't know the name of  
6 the prison and had never heard of the prison.

7 So, I began to reach out to various people. I  
8 called Mr. White. I e-mailed Mr. White, does anybody know the  
9 name of this prison, where it's located? I then contacted Mr.  
10 Gonzalez even though he was then with the federal government,  
11 asked him if he would tell me what the name of the prison was.  
12 I told him the reason I wanted to find out the name is because  
13 I believe David Clarke was at that prison.

14 Mr. Gonzalez wrote me back by e-mail, said to me  
15 here's the address, here's who you have to contact, then have  
16 Ms. Irving call there. They confirmed David Clarke was an  
17 inmate there, gave us his registration number. I then  
18 contacted Larry Frost, one of my New York investigators, said  
19 I would like to try to go over, at least meet Mr. Clarke.

20 Q Let me show you what's marked as S 307-A for  
21 identification. What do you recognize it to be?

22 A A series of e-mail exchanges between Frank Gonzalez, my  
23 former investigator then with the U.S. Marshal's Office in  
24 March of 2008 regarding the location of David Clarke in the  
25 prison.

Si mel s-cross-Shargel

1299

1 Q You're telling the person who is now at this time a  
2 United States Marshal or deputy marshal that you wanted to  
3 visit David Clarke?

4 A Exactly.

5 MR. SHARGEL: I offer S 307-A into evidence.

6 THE COURT: Any objection?

7 MR. D' ALESSANDRO: No.

8 THE COURT: Received.

9 (So marked.)

10 Q This starts, do you know the name of the facility in  
11 Queens where they house federal prisoners. Then Mr. Gonzalez  
12 answered the question, tells you where it is, correct?

13 A Correct.

14 Q Tells you the contract facility run by the former chief  
15 deputy U.S. Marshal for the Eastern District, nice place, the  
16 people there treat you very nice. He didn't have the exact  
17 address, said he was homesick sick but he would get it for  
18 you?

19 A Yes.

20 Q You ultimately got the correct address, right?

21 A Yes.

22 Q Let me show you what's been marked as 307-C for  
23 identification. You recognize this?

24 A E-mail I was copied on from Ms. Irving on March 20th.

25 MR. SHARGEL: For identification, Judge, I'm sorry.

Si mel s-cross-Shargel

1300

1 Q This is what?

2 A It was an e-mail I was copied on from Ms. Irving on  
3 March 20th, 2008.

4 Q On the question of the visit to the Queens facility?

5 A Yes.

6 MR. SHARGEL: Offered in evidence.

7 MR. D' ALESSANDRO: No objection.

8 THE COURT: Received.

9 (So marked).

10 (Continued on next page.)  
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Simel s - direct - Shargel

1301

1 BY MR. SHARGEL:

2 Q And this simply is an e-mail to Diarmuid White; it's  
3 Diarmuid, but it's Diaramuid White?

4 A Yes.

5 Q It says: "I called the Queens facility, and confirmed  
6 Clark is there and what his registration number is"?

7 A That's correct.

8 MR. SHARGEL: Judge, would this be an appropriate  
9 time?

10 THE COURT: Yes.

11 Don't discuss the case. We'll resume in ten  
12 minutes.

13 (Jury excused.)

14 MR. SHARGEL: Judge, in fairness, I just want to  
15 tell you that my estimate may be off. I'm going slower than I  
16 thought I would.

17 THE COURT: I figured that out already.

18 (Recess.)

19 (In open court; jury not present.)

20 THE COURT: Bring in the jury, please.

21 (Jury present.)

22 THE COURT: Please be seated.

23 Go ahead, Mr. Shargel.

24 MR. SHARGEL: Thank you, your Honor.

25 BY MR. SHARGEL:

Simels - direct - Shargel

1302

1 Q So, before the break that we took, I was asking you  
2 questions and you were giving me answers about your visit to  
3 see David Clark at the Queens facility.

4 You remember those questions; correct?

5 A Yes, I do.

6 Q And tell us what happened. Tell us exactly what happened  
7 when you got to that Queens facility, who you were with.  
8 Remind us again.

9 A I met Larry Frost, my -- one of the private investigators  
10 that I had working on the case, in front of the facility.

11 Q And what happened?

12 A We went in together. The door was opened for us.

13 Q Keep your voice up a little bit.

14 A I'm sorry. We went in together. I believe a woman guard  
15 or correction person opened the door. I looked around, saw  
16 the typical cameras and other things that are attendant to  
17 federal facilities.

18 She asked me for my identification. I presented her  
19 my bar card. I believe Larry presented -- Frost presented to  
20 her his private investigator's license. I didn't really watch  
21 to see where she entered it. I assume she wrote it down  
22 somewhere. She gave us a locker key. We agreed to share a  
23 locker. We put our personal items in the locker, and she told  
24 us to wait and she would get the inmate down.

25 Q How many times, as best you can tell us, have you visited

Simels - direct - Shargel

1303

1 inmates in federal jails in the United States during the  
2 course of your career?

3 A Hundreds, if not thousands.

4 Q And had you ever been asked, in connection with a visit  
5 to a federal jail, as to whether you were the person's lawyer?

6 A Never.

7 Q Were you asked on this occasion, in March of 2008,  
8 specifically March 27, 2008, whether you were the lawyer for  
9 the person that you were visiting?

10 A I was never asked that question.

11 Q Do you know of instances where you have written to a  
12 warden or some person in authority at a jail to get permission  
13 to see a person?

14 A In the Roger Khan case alone, I wrote to about ten jails  
15 when I went to see Peter Headley. When Frank Gonzalez did, we  
16 wrote to prisons Upstate New York, in Florida, across the  
17 country, to give our investigator and/or myself access to  
18 those individuals.

19 Q Were you successful in obtaining access on each and every  
20 one of those occasions?

21 A On each and every one. And I never said I was a person's  
22 attorney.

23 Q What happens when you actually see David Clark on that  
24 day?

25 A We were told, Mr. Frost and I, by the guard to go into



Simels - direct - Shargel

1304

1 the room to the left of the hallway we were seated in,  
2 reception area.

3 We walked in. The door to the back opened up. A  
4 black man of, I would say, five foot-nine, somewhere in his  
5 late forties, early fifties, walked in, dark skin.

6 I said, Are you David Clark? I'm Robert Simels. I  
7 represent Roger Khan.

8 The person backed out of the room, and that was the  
9 end of the meeting, and we left.

10 Q Were you in any way forceful? Did you raise your voice,  
11 did anything like that happen?

12 A No.

13 Q He refused to be interviewed, and you left?

14 A Right. I thought I had been successful with Nigel  
15 Rodney. I was hoping that I would be successful with David  
16 Clark.

17 Q Why did you want to talk to David Clark?

18 A Well, I wanted to speak to David Clark, because I had a  
19 lot of information on David Clark, not as much then as I would  
20 later on. I had enough information to know that he had been  
21 on Roger's target list. He had been on tapes, that he had  
22 properties in Guyana that he didn't tell the government of the  
23 United States about that would have been subject to  
24 forfeiture.

25 I wanted to confront him with all those things.

Simels - direct - Shargel

1305

1 Plus the fact that I knew he was on tape, putting on the tape  
2 with Lilly his real source of the drugs, and it was not Roger  
3 Khan. I had found out from my visits many things about Lilly  
4 -- about Clark, and I wanted to persuade him it was in his  
5 interest to go to the prosecutors and tell them the truth, or  
6 hopefully he would talk to us just as Lilly had,  
7 and we would gain information

8 Q Given the fact that he didn't talk to you at all, did you  
9 ever go back, by the way?

10 A No.

11 Q Given the fact that he didn't talk to you at all, did  
12 that have any value, his refusal to talk to you?

13 A Yes.

14 Q Explain to the jury what value that was.

15 A Well, even as we hear here, if a witness meets with the  
16 government ten, fifteen times to prepare for their trial, and  
17 you say to that witness on cross-examination, Have you met  
18 with the government ten or fifteen times, I came to see you to  
19 ask you to speak to us, did you refuse to meet with us?, and  
20 the answer would be, in this case, Yes, I refused to meet with  
21 you, the jury can make whatever evaluation of that information  
22 they wanted to, but I thought it had value.

23 Q Now, I want to go back to the conversations on the  
24 laptops.

25 Did there come a time when you turned conversations

Simels - direct - Shargel

1306

1 that you wanted to use or intended to use at trial over to the  
2 prosecutors in the case?

3 A Judge Irizarry had directed Diarmuid White and myself, in  
4 March of 2008, not to wait until we got closer to trial, but  
5 to turn over all tape-recordings that we intended to use,  
6 whether during cross-examination or on the defense case, to  
7 the prosecutors in March of 2008.

8 Q Did you comply with Judge Irizarry's orders?

9 A I did. I forwarded copies of a disk of all conversations  
10 and calls we wanted to introduce.

11 Q I show you what's been marked for identification as  
12 S-308-B. I ask you if you recognize this.

13 A I do.

14 Q What do you recognize it to be?

15 A The letter I sent to the Assistant United States  
16 Attorney, containing copies of all the conversations we  
17 intended to potentially use at trial.

18 MR. SHARGEL: I offer it into evidence.

19 MR. D'ALESSANDRO: No objection.

20 THE COURT: Received.

21 (So marked.)

22 Q I am including four CD's containing conversations that  
23 the defense may introduce at trial in its defense in  
24 conformity with the direction of the Court?

25 That's Judge Irizarry; correct.

Simel s - direct - Shargel

1307

1 A That would be correct.

2 Q There was an enclosure with this, was there not?

3 A Yes, four CD's.

4 Q Do you remember hearing back from the government in  
5 connection with the CD's that had been turned over?

6 A On a number of occasions.

7 Q Do you remember, in May of 2008, receiving a letter  
8 asking questions about what had been turned over?

9 A I believe in around May 23, 2008 or thereabouts, the  
10 prosecutors sent a letter saying they wanted to inspect the  
11 original equipment from which the tape-recordings were made.

12 Q Let me show you what has been marked as Defendants'  
13 Exhibit 308-C for identification?

14 Do you recognize this.

15 A That's the May 23 letter that the prosecutors faxed to  
16 Diarmuid White, which he then forwarded to me.

17 MR. SHARGEL: I offer this in evidence.

18 MR. D'ALESSANDRO: No objection.

19 THE COURT: Received.

20 (So marked.)

21 Q I just want to publish or read the highlighted portions.  
22 "May 23, 2008. The government is in possession of the four  
23 CD's, compact disks."

24 By the way, this is May 28, more than a month after  
25 you turned the CD's over; correct.

Simels - direct - Shargel

1308

1 A Two months after.

2 Q Two months after. Two months after the date that you  
3 turned over the CD's; right?

4 A Correct.

5 Q This is the first time that you heard anything from the  
6 government in response to your disclosure of the CD's; right?

7 A I believe so.

8 Q So, it says here that "The government is in possession of  
9 the four compact disks, CD's, that the defendant produced to  
10 the government. In reviewing those CD's, the government found  
11 the following." And the government had questions. Without  
12 getting into the details, there were questions raised about  
13 the tracks of the recordings and so on.

14 Right?

15 A Yes.

16 Q And the second page, it says: "Also, please describe how  
17 each of the recordings were made, including the equipment  
18 used. In addition, the government requests that a computer  
19 expert inspect the original recordings at a mutually  
20 convenient time."

21 Do you see that?

22 A Yes, sir.

23 Q You had the recordings that were in the laptop like any  
24 other computer file; correct?

25 A Exactly.

Simels - direct - Shargel

1309

1 Q If you wanted to play a certain recording, you  
2 double-clicked on the recording, and that was what was played  
3 on whatever mechanism the computer was using?

4 A Yes.

5 Q I-Tunes or Windows or an application like that?

6 A Exactly.

7 Q Did you understand the laptops to have the originals of  
8 the recordings?

9 A I don't know whether they did or not. But that was the  
10 only piece of equipment that we had that had the recordings,  
11 so I assumed that they wanted to inspect that -- maybe both  
12 laptops.

13 Q Did you have to take certain steps to make sure that when  
14 trial occurred, you could get these into evidence?

15 A If you don't comply -- that is, give the prosecutors,  
16 like they should give us, as well, an opportunity to inspect  
17 the original equipment if a demand is made -- you can be  
18 precluded -- that is, stopped -- by the Court from utilizing  
19 that evidence at trial for failure to cooperate with the other  
20 side in violation of the rules.

21 So, we wanted to make sure that we were compliant,  
22 so that we can use those tape-recordings.

23 Q I show you what's been marked as Defense Exhibit S-308-D  
24 as in David for identification. I ask you to tell us whether  
25 you recognize this.

Simels - direct - Shargel

1310

1 A I believe this is a list that we provided to the  
2 prosecutors in the Khan case of each track that they would be  
3 hearing, so that they could identify, if they wished, which  
4 calls that we might seek to introduce, and what they might  
5 want to inspect. I believe I gave it to them, the chart,  
6 around June 11, 2008.

7 Q This chart is undated.

8 Was this prepared in your office?

9 A It was prepared in my office, and handed by me to either  
10 Ms. Peterson or Ms. Jones in the courthouse when we were  
11 before Judge Irizarry.

12 Q In response to what I have read before?

13 A Yes.

14 Q This was in fact referenced in a later letter that the  
15 government, Ms. Peterson, wrote to you; right?

16 A That's correct.

17 Q And actually, it was Shannon Jones who wrote to you and  
18 referenced this chart; correct?

19 A Yes. The prosecutors wrote a letter to me I believe in  
20 July, acknowledging the June 11 chart that we provided.

21 MR. SHARGEL: I offer 308-D in evidence.

22 MR. D'ALESSANDRO: No objection.

23 THE COURT: Received.

24 (So marked.)

25 Q Do you remember hearing again from the government on

Simels - direct - Shargel

1311

1 July 10, 2008 in connection with this matter?

2 A Yes.

3 Q And do you remember the government again saying that the  
4 information that you supplied was inadequate, that they needed  
5 more information?

6 A Correct.

7 Q I show you what's been marked as Defense Exhibit S-308-E  
8 for identification.

9 And do you recognize this?

10 A Yes. This is a letter that I received, as it indicates,  
11 both by Federal Express and e-mail on July 10, 2008 from the  
12 prosecutors, asking for more information about the equipment.

13 MR. SHARGEL: I offer this document, 308-E, in  
14 evidence.

15 MR. D'ALESSANDRO: We can agree on a redaction?

16 MR. SHARGEL: Sure.

17 I'll offer the part that has been highlighted in  
18 yellow on the copy that you have before you, your Honor.

19 THE COURT: All right. As redacted, received.

20 (So marked.)

21 Q So, I will read it. I will not put it on the Elmo.

22 May I publish to the jury by reading it?

23 THE COURT: Yes.

24 MR. SHARGEL: All right.

25 In this letter dated July 10, 2008, the prosecutor



Simels - direct - Shargel

1312

1 writes to Mr. Simels and it says, among other things, but this  
2 is the part in evidence: "First, on May 23, 2008, the  
3 government wrote Mr. White regarding the four CD's produced by  
4 the defense. By letter dated June 11, you responded to some  
5 but not all of the questions contained in that letter.

6 "For example, we requested information regarding how  
7 the recordings were made, including the equipment used. That  
8 information has not been provided. We also do not understand  
9 why the CD's produced indicate that they were all 'modified,'  
10 quote unquote, on December 31, 1994, yet the chart attached to  
11 your June 11, 2008 letter indicated that the calls were  
12 intercepted on different dates between October of 2004 and  
13 March of 2006. Please describe the source of the information  
14 contained in the June 11, 2008 charts.

15 "Also, the chart you provided only listed one  
16 telephone number per speaker intercepted call. We request  
17 that the telephone numbers of both parties intercepted be  
18 provided. And finally, please let us know when we may have  
19 our computer expert inspect the original recordings."

20 Q Sir, while all this is going on, these requests from the  
21 government in the spring and early summer of 2008, did you  
22 have any conversations with Mr. Khan concerning this  
23 equipment?

24 A I did. Actually, Ms. Irving did, as well.

25 Q As a result of the conversations that you had with

Simels - direct - Shargel

1313

1 Mr. Khan, did you seek to have more equipment brought into the  
2 United States?

3 A First, we, based upon what Mr. Khan advised us, decided  
4 that there might be more conversations on the small laptop  
5 that I had brought back in October of 2007 which we never  
6 accessed. So, I had a different IT person, who is coming to  
7 the office, Mr. Kern, Justin -- Justin Kern, attempt to bypass  
8 a password on that small laptop, so we can see if there were  
9 additional recordings that had to be produced to the  
10 prosecutors regarding Clark or other people.

11 And since I was under the impression at that point  
12 that these were not the intercept pieces -- that is, the  
13 laptops -- but that there was some base-type power source that  
14 he needed to be able to connect with it, I began to make  
15 inquiries by e-mail and calls to Guyana if that base existed  
16 somewhere, because we would have to produce it for inspection  
17 for the prosecutors.

18 Q Now, throughout the summer of -- withdrawn.

19 So, as a result of that, did you make efforts to get  
20 the base.

21 A I did.

22 Q And tell us what those efforts were.

23 A I e-mailed several people. We contacted an individual  
24 named Reagan, Mark Reagan you have heard about, asked him if  
25 he knew how to access the base. We provided my Fedex number,

Simels - direct - Shargel

1314

1 the business's Fedex number, to have them ship it up if and  
2 when they found it. And I was notified that it had been found  
3 and was being sent to New York.

4 Q There was a letter that was introduced yesterday, where  
5 Mr. Khan was suggesting that you should be showed at some  
6 point how this eavesdropping equipment worked?

7 A I think that was back in 2007.

8 Q Whether this was in 2007 or 2008, right up until today,  
9 have you ever been given a demonstration as to how this  
10 equipment worked?

11 A No.

12 Q From 2007 or anytime when the subject of equipment came  
13 up, did you ever see that base that we have in evidence  
14 operational?

15 A Never.

16 Q You heard Mr. Meyers's testimony. Did you then or do you  
17 now have an understanding of how radio waves are converted by  
18 the software in the computer, anything like that?

19 A I never had any indication. I tried to get information  
20 about it at some point, but Mr. Meyers and his company refused  
21 to give us any.

22 Q We'll get to that in a minute?

23 Did you, sir -- did you know or have any knowledge  
24 whatever that that base and the laptop computer was somehow  
25 primarily useful for wiretapping the conversations.

Simels - direct - Shargel

1315

1 A I didn't know there was any connection between the two.  
2 I had never seen the base. I didn't care about the base. I  
3 just wanted it here so the prosecutors couldn't say we didn't  
4 produce it.

5 When Fedex apparently said they had to open the box,  
6 I told Ms. Irving, Tell them to open the box. I don't care  
7 what's in there. And they did. If I was trying to hide it, I  
8 certainly wouldn't tell Fedex and customs to open the box, and  
9 they did, and they ultimately delivered it.

10 We had been told that this equipment was  
11 non-functional. GTT agents told us, Guyana Telephone and  
12 Telegraph, had told me, the head of the company, they changed  
13 from analog to digital in 2004, 2005. This equipment was  
14 nonfunctional, as far as I know.

15 Q Now, Mr. Simels, you just referenced a moment ago, and we  
16 have seen, e-mails in evidence that were admitted for a  
17 limited purpose, but e-mails between you and Mr. Meyers and  
18 other individuals at the Smith Meyers Company; correct?

19 A Correct.

20 Q You were seeking information -- the jury has seen these  
21 e-mails already -- you were seeking information in connection  
22 with the equipment that had been used to overhear or eavesdrop  
23 on the conversations; right?

24 A We were not trying to make any secret of it, not only  
25 because we were providing these to the government, but --

Simel s - di rect - Shargel

1316

1 THE COURT: Listen to the question and answer the  
2 question, please, sir.

3 THE WITNESS: I'm sorry, your Honor.

4 (Continued on next page.)  
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Simel s - direct/Shargel

1317

1 THE COURT: Listen to the question and answer the  
2 question, Mr. Simel s.

3 THE WITNESS: I'm sorry, your Honor.

4 Q Your e-mail correspondence was an effort to obtain  
5 information in connection with this equipment; correct?

6 A I served a subpoena on the company and I was looking to  
7 get them to comply with the subpoena that had been signed by  
8 Judge I r i z z a r y.

9 Q That was my next question. You obtained an order from  
10 Judge I r i z z a r y that the company comply with the subpoena?

11 A On April 28, 2008, I met with Judge I r i z z a r y along with  
12 Mr. White, out of the presence of the prosecutors.

13 Q Hold on. Is that a permissible proceeding?

14 A It's called an ex parte proceeding, and it was one that  
15 the judge had authorized to have, to make a presentation to  
16 her out of the presence of the prosecutors as to what our  
17 evidence might be at the Khan trial, so that it could be kept  
18 secret.

19 We presented to her at that time all of the  
20 subpoenas that we wanted her to sign, subject to the judge's  
21 review, subject to our providing her a good, valid reason why  
22 we wanted the materials, and why she should execute the  
23 subpoenas.

24 Q As a result of that submission, that oral submission to  
25 Judge I r i z z a r y, did the judge sign an order?

Simels - direct/Shargel

1318

1 A She signed sentence for not only that company, Smith  
2 Myers, but for an FBI agent in Florida named Justin Kridder  
3 who had information about that equipment as well.

4 Q What was the intent or purpose of you obtaining this  
5 information?

6 A We wanted to be able to demonstrate that Roger was in  
7 fact a hero helping Guyana and not a criminal as the  
8 government was suggesting --

9 Q Did it have anything whatever to do with who actually  
10 purchased the equipment at the time it was being used?

11 A Yes.

12 Q At the time that it was being used, that was before you  
13 were retained by Roger Khan; correct?

14 A It was purchased in 2003 through The Spy Shop in Miami,  
15 through Smith Myers, by the government of Guyana. We had the  
16 authorization from the Minister of Health, Leslie Ramsammy.

17 Q Just for clarity's sake. You don't meet with Khan until  
18 August of 2006; correct?

19 A I met him in July 2006 and was retained August 6, 2006.

20 Q There were other pieces of correspondence on this very  
21 same subject, the equipment, and I want to see if I can move  
22 this along by referencing three documents in chronological  
23 order.

24 I'm putting before you for identification S308 F.  
25 Do you recognize that?

Simel s - direct/Shargel

1319

1 A It's a letter that I would have sent -- I did send  
2 through the electronic filing system to the judge in the Khan  
3 case.

4 Q Judge Irizzary?

5 A Judge Irizzary.

6 MR. SHARGEL: I would offer this into evidence. Do  
7 they want a redacted copy or full copy?

8 MR. D'ALESSANDRO: Can we confer with counsel?

9 THE COURT: You may.

10 MR. SHARGEL: We have agreed that I am offering a  
11 redacted portion of the letter of July 23, 2008.

12 THE COURT: All right.

13 MR. SHARGEL: That is S308 F. In parentheses it will  
14 be marked redacted.

15 May I publish it to the jury by reading that portion  
16 that has been admitted?

17 THE COURT: You may.

18 MR. SHARGEL: The prosecution has sought  
19 information -- a letter to Judge Irizzary, dated July 23,  
20 2008.

21 The prosecution has sought information concerning  
22 tape recordings provided to it by the defense, specifically,  
23 attempting to determine why the CDs have a December 31, 1994  
24 modification date.

25 We have determined that whenever we use the Roxio



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1 program for burning CDs that the modification date on all  
2 recordings lists the files as being modified on December 31,  
3 1994, not simply in this matter.

4 We do not know the reason for that glitch with the  
5 Roxio program and are attempting to obtain an answer from our  
6 IT support group. The chart provided to the prosecution have  
7 the actual dates of the calls.

8 So that's further correspondence dealing with other  
9 things, but dealing with the recordings as well, right?

10 A Yes, sir.

11 Q And on July 7, 2008 -- actually what I would like to do  
12 is introduce, or actually show for identification Simel s S308  
13 G.

14 I ask you if you recognize that?

15 A It was a letter that the prosecution wrote on August 7,  
16 2008 to me.

17 MR. SHARGEL: I offer it into evidence. If the  
18 government wishes a redacted offer, I will do that too.  
19 Defendant's Exhibit S308 G redacted.

20 THE COURT: Received. We will redact the extraneous  
21 material and you can publish it to the jury by reading it.

22 MR. SHARGEL: This is from the government, dated  
23 August 7, 2008, from Shannon Jones. The government lawyer  
24 writes: We understand our outstanding unresolved disputes to  
25 be, and then item 2, the government's request for additional

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1 information regarding the recordings produced by the defense  
2 and request to review the originals.

3 Finally, I show you what has been marked for  
4 identification as Defense Exhibit S308 I. I ask you if you  
5 recognize this?

6 A Yes. I had written back to Miss Jones, I believe, in  
7 response to her August 7 letter. She was now writing back to  
8 me on August 14, 2008.

9 MR. SHARGEL: I offer this into evidence. I will  
10 show it to the government and see whether the government  
11 wishes to have a redaction.

12 I'm offering a redacted version of S308 I redacted,  
13 and if it's marked in evidence, I would like to read one  
14 portion.

15 THE COURT: Received. You may.

16 (So marked.)

17 MR. SHARGEL: Paragraph on the first page. A letter  
18 dated August 14, 2008 to Mr. Simel s.

19 Dear Mr. Simel s: In the government's prior requests  
20 regarding the recordings produced by the defense, we requested  
21 information regarding how the recordings were made, including  
22 the equipment used.

23 We asked for the source of the information contained  
24 in the June 11, 2008 chart. We also requested the telephone  
25 numbers of both parties intercepted be provided. None of that

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1 information has been provided. Furthermore, you have ignored  
2 our request to have our computer expert inspect the original  
3 recordings.

4 You received that, right.

5 A I did.

6 Q This is dated August 14. Did you ever get to give the  
7 government the equipment?

8 A No. We were trying to arrange back the next day before  
9 Judge Irizzary for a mutual inspection. We wanted to inspect  
10 a computer they had, they wanted to inspect our equipment. It  
11 didn't happen before I was arrested.

12 Q Did you have any motive or any reason why you wanted the  
13 computer base in your office other than to have it inspected  
14 by the government?

15 A That was the only reason it was there and it would have  
16 been shown to the government at a mutually convenient time.

17 Q You made an effort to get into that second laptop, the  
18 smaller one, with the help of the IT person?

19 A Justin Kern, did, yes.

20 Q Was Justin Kern as successful at John Conti?

21 A He was.

22 Q Did you find digital conversations with David Clarke?

23 A I don't know the answer to that. We might have.

24 Q Let me ask you this question. Did there come a time when  
25 you met Selwyn Vaughn?

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1 A There was. May 13, 2008.

2 Q And had you heard Selwyn Vaughn's name before that?

3 A Yes.

4 Q When?

5 A Well, I heard the name Selwyn Vaughn I think for the  
6 first time around May of 2008. But I heard the name Fineman  
7 before then.

8 Q When was that?

9 A I first heard the name Fineman in around March of 2007.

10 Q How did you hear it?

11 A I got a call from an individual who said he was a friend  
12 of Roger Khan, who said his name was Fineman and that he  
13 wanted to go see Roger Khan in jail.

14 Q What did you say?

15 A I said no.

16 Q Why?

17 A Roger Khan -- the prisons permit an inmate to put on his  
18 list close family members and friends. Roger Khan had many  
19 people coming to see him. I didn't think he wanted to see  
20 anybody. I never heard of this person, and I certainly wasn't  
21 going to authorize him to visit Roger.

22 Q What was the next time that you heard the name Fineman,  
23 heard or read the name Fineman?

24 A In around October of 2007, when Mr. Khan had suggested I  
25 try to find the Fineman, the informant, when I went to Guyana.

Simel s - direct/Shargel

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1 Q Did you try to -- I think we had this question before,  
2 forgive me for asking it once more -- October 20, 2007 when  
3 you were in Guyana, you weren't looking for him?

4 A No.

5 Q When did you next hear -- after that, when did you next  
6 hear about Fineman?

7 A Roger Khan was very a involved client and sent us memos  
8 all the time, and in January of 2008, sent me a memo on his  
9 view of the Rule 15 depositions that were to take place, I  
10 believe, January 18, 2008.

11 He prepared the memo, and in his rule 15 memorandum,  
12 Roger Khan said to me that he wanted the following number of  
13 people called at his rule -- at the Rule 15 depositions, if  
14 permitted by the court. One of the people listed was Fineman.

15 MR. SHARGEL: We have the Government Exhibit already  
16 in evidence, Judge, we have to switch to the laptop now,  
17 Government Exhibit 31 -- 3500 SV 31, the 3500 pieces marked as  
18 exhibits.

19 Could we turn to the page that says Fineman. Blow  
20 that up.

21 Q Is this memo that you were talking about?

22 A It is exactly.

23 Q This is what you received from Mr. Khan, from Roger Khan,  
24 on or about January, what, 15 --

25 A 18, somewhere around there.

Simel s - di rect/Shargel

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1 Q Middle of January, 2008?

2 A That's correct.

3 Q Did you follow up with Fineman, the suggestion that  
4 Fineman be a Rule 15 witness?

5 A I did not.

6 Q Did you make any application to Judge Irizzary or any  
7 other judge to have Fineman added to the list of people who  
8 would be deposed under the authority of Rule 15?

9 A No, I had met the others, and that's why they were  
10 contained in the Rule 15. I had not met this person and I was  
11 certainly not putting down his name to testify.

12 Q Now, what is your understanding, with your years of  
13 experience as a defense lawyer, what is your understanding as  
14 to whether you need to pursue leads supplied by a client?

15 A It's an obligation, a requirement that we do so.

16 Q At this point in time had you fulfilled the obligation as  
17 far as finding Fineman, interviewing Fineman?

18 A No. I hadn't made any effort.

19 Q Why not?

20 A We were in the process of interviewing hundreds of people  
21 in this case. We were in the process of reviewing 5500  
22 conversations off the Lilly wiretap, 540 conversations -- 544  
23 conversations off of the Dave Persaud wiretap; endless  
24 documents, thousands of documents, in addition to following  
25 through on other parts of the investigation, as well as many

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1 legal proceedings we were going through before Judge Irizzary.

2 We had an April 28 trial date set for 2008 and I was  
3 trying to be ready for April 28. I didn't really have time to  
4 complete that.

5 Q Could we go to the first page again of 3500 SV 31. Could  
6 you make larger the to and from part.

7 So this was sent to you by Roger Khan, not only to  
8 you but to Mr. White, Diarmuid White, correct?

9 A Actually I think that's how I may have gotten it, through  
10 Diarmuid White.

11 Q Mr. Khan had access to a typewriter in the jail, did he?

12 A He was a prolific typewriter writer.

13 Q You would receive typewriter written -- you would receive  
14 these regularly?

15 A He prepared memorandums, typewritten and otherwise,  
16 continuously.

17 Q So Mr. White had this as well, correct? I think you said  
18 a moment ago that you thought you received it from him,  
19 correct?

20 A If he didn't have it first, he got it second.

21 Q In any conversation that you had with Roger Khan, in or  
22 around the time that you got this document, did he ever say,  
23 wink, wink, this isn't true, or anything like that?

24 A No. Roger Khan, as I say, was a very hands-on client.  
25 He gave assignments that he thought would be completed, should

Simels - direct/Shargel

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1 be completed for him and he seemed to be very efficient about  
2 what he wanted done.

3 Q Did he ever suggest that this was somehow false  
4 information?

5 A Never.

6 Q Now, you met Mr. Vaughn on May the 13, 2008, correct?

7 A That's correct.

8 Q Before he walked into your office you had never set eyes  
9 on him in your life, right?

10 A Never.

11 Q And the conversation -- we've heard a part several times  
12 and we have heard the entirety -- at any time during that  
13 conversation were you told that -- told by Vaughn that he had  
14 participated in violent acts?

15 A Never.

16 Q Were you told anything in any of your trips, the three  
17 trips that you described to Guyana, did anyone in Guyana tell  
18 you that Fineman or Selwyn Vaughn was a part of some  
19 murderous, violent gang?

20 A Never.

21 Q Did you have a -- based on the investigation that you  
22 told us about, did you have any evidence, sir, that he had  
23 participated in the murder of Donald Allison by pointing him  
24 out for the actual killers?

25 A No. And to the contrary, my client had been telling me



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1 for six months at that point to investigate the Donald Allison  
2 murder.

3 We had memos from him, telling me to investigate it  
4 because that would demonstrate he had nothing to do with the  
5 killing. It seemed to be an exercise that he wouldn't have  
6 had me undertake if he thought he was involved.

7 Q Let me wrap this into one question. Did Selwyn Vaughn on  
8 May the 13, 2008, or at any other time up to the date that you  
9 were arrested, tell you about the Waddell murder or the  
10 torture of a woman, or bombs and CD players or television  
11 sets, did he say anything about that?

12 A Never.

13 Q What was his manner of dress? We've seen him in court.  
14 What was his manner of dress when he came to see you at your  
15 office?

16 A My recollection is he wore slacks and a shirt and he was  
17 very respectful when he came in.

18 Q What was your purpose in seeing him -- when he called you  
19 on the telephone, what was your purpose of seeing him on May  
20 the 13?

21 A When Judge Irizzary on May 30 or 31 of 2008 had adjourned  
22 the trial till October of --

23 Q I'm sorry. Did you misspeak? Did you say May the 30 that  
24 she adjourned the trial?

25 A I thought I said -- well, March 30 of 2008, she had said

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1 that she was adjourning the case till October 27, 2008. Since  
2 my client had been insistent that I see --

3 Q What was the reason for the adjournment?

4 A She said -- she advised that us that there were too many  
5 pending motions that had to be decided and that she wanted  
6 additional time to consider them.

7 Q Go ahead. What is the purpose of seeing him on the 13?

8 A I had not seen him, although my client had raised his  
9 name to me back in October of 2007, again in the January 18,  
10 2008 memorandum. We had additional time to develop additional  
11 information to use at the trial. I thought I would meet with  
12 him.

13 Q You told us earlier that Khan was denying that he was a  
14 violent person, right?

15 A He absolutely denied it.

16 Q Did he ever suggest to you or tell you that Vaughn was a  
17 violent person?

18 A No.

19 Q Did you believe that, during the meeting of May 13, and  
20 after the meeting of May 13, that Vaughn would be a witness?

21 A For me?

22 Q For you?

23 A No.

24 Q And why is that?

25 A Number one, we already had in place through our Rule 15

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1 application the people we wanted to use against David Clarke  
2 from Guyana. There was no room for this person at this point,  
3 even if we had thought about using him.

4 Number two, based upon what he said to me at the  
5 first meeting, I thought he was lying to me. He was denying  
6 everything my client had told me about him. I thought he was  
7 just lying, but I was prepared to go back to my client and say  
8 this guy lied to me. So we're never using him. That would  
9 have satisfied Khan and satisfied myself.

10 Q Did Selwyn Vaughn have any -- based on the statements  
11 that he made to you, did Selwyn Vaughn have any value or  
12 benefit to your defense efforts?

13 A Sure. I was told that he could locate people and find  
14 them and perhaps be of help that way. He could certainly be a  
15 source of information here in the United States, potentially  
16 could call people in Guyana for me and maybe get them to move  
17 a little quicker in terms of some of the assignments I had.  
18 He had some value, but not much.

19 Q Earlier on in the conversation there's a discussion  
20 between you and Vaughn where he is filling out an application  
21 to go visit Roger Khan, correct?

22 A Yes.

23 Q And you asked him, or he was asked what he did for a  
24 living and his answer was, entrepreneur, do you remember that?

25 A I remember him saying entrepreneur, yes.

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1 Q Shortly after that in conversation you say, Well, you  
2 have to say something that you do something, like a laborer;  
3 do you remember that?

4 A Yes.

5 Q Was this what you would call as a defense lawyer witness  
6 preparation?

7 A We generally as a defense attorneys don't really,  
8 although we're getting ready, we don't really make our mind up  
9 about what the defense case is until we really hear the  
10 prosecution case.

11 We may think we are going to call witnesses, not  
12 call them. In no way, five and a half months in advance of a  
13 proposed Khan trial, was I deciding that day that he was going  
14 to be a witness for us. I was listening to him, and he gave  
15 me this entrepreneur remark, which I that it was silly, but  
16 I've heard silly remarks before.

17 I told him, if you're going to be candid in this  
18 case, if you're going to be a witness, you have to say what  
19 you really do, whether you're a laborer or whatever you do.  
20 That was the conversation.

21 Q If you knew that he wasn't going to be a witness, why did  
22 you discuss the idea or the proposition that he would be a  
23 witness, why did you keep it going?

24 A He called in March of 2007, and I hadn't heard from him  
25 or been able to reach him since that point and nobody seemed

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1 to know where to reach him.

2 I had a guy who I had a contact with now. I was  
3 prepared to at least go back to Roger Khan after this meeting  
4 and say, Here's what this guy told me. It's inconsistent with  
5 what you're telling me. Has he any value or is there  
6 something I can say to trigger him to make him tell me the  
7 truth?

8 Q What other information did you actually learn, as best  
9 you can recall, from Mr. Khan on the 13?

10 A From Mr. Vaughn?

11 Q From Mr. Vaughn. Sorry.

12 A Well, he did tell me some things that were of interest to  
13 me. He told me that he was a neighbor of the Allisons. He  
14 told me he was a neighbor of the Clarkes in Agricola, that was  
15 of interest to me. He told me he was very close with Rondell  
16 Rawlins, who was part of the Buxton crew. That was of  
17 interest to me because it was information that I thought could  
18 be used and developed.

19 That was the reason why I began to ask him, if you  
20 recall in the conversation, how you did you meet these people?  
21 What are they like? Where do they live? Did you go to school  
22 with them? Did you not go to school with them? Questions  
23 like that. I wanted more information.

24 Q On this date, the first meeting on May the 13, 2008,  
25 again, you were months away from hearing from the government

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1 their concession that there was another Fineman -- I'm sorry,  
2 another Shortman involved in drugs, right?

3 A Right.

4 Q And one part of the discussion on May 13 dealt with  
5 whether there were other people named Shortman, right?

6 A Yes. I found his conversation to be extremely bizarre in  
7 that regard, that day. He says to me, Shortman, man, that's  
8 how we go. Then I asked him about is there any other Shortman  
9 besides Roger? He says not in our group.

10 I said, Are you telling me there's no other  
11 Shortman, no other Fat Man, no other Fineman? And he says,  
12 no, there's not. Then a little bit later in the conversation  
13 he says once again, that's how we go. So I found what he was  
14 saying to me a little bit strange in light of, one, my own  
15 experiences having been in Guyana on three occasions at that  
16 point, having met many FineMen, TallMen, ShortMen, and my own  
17 investigation.

18 So I thought he was sort of making it up or not  
19 wanting to be involved. Many people don't want to be  
20 witnesses in federal cases. Many people don't want to  
21 cooperate and help but want to at least be able to say to  
22 their friend, Hey, I went to your lawyer. I met with him. I  
23 did what I had to do, and then they disappear.

24 Q At any time during the meeting on May 13 did you intend  
25 to have Fineman present false testimony to the -- to this or

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1 any other court?

2 A There was no possi bility on May 13 that I would call hi m  
3 i n any court anywhere. The answer i s no.

4 Q Did you have i n mind on May 13 that Fineman should go out  
5 and do harm to any other person?

6 A Never.

7 (Continued next page)

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1 CONTINUED DIRECT EXAMINATION

2 BY MR. SHARGEL:

3 Q Did you have in mind on May 13th, 2008, that Fineman  
4 should go out and bribe people?

5 A No.

6 Q On June 2nd, 2008, a couple of weeks later, did you  
7 receive an order from the court, from Judge Irizarry?

8 A Yes and whatever my feelings about it prior to that, the  
9 world has changed as of June 2nd. On that date, Judge  
10 Irizarry granted my application on behalf of Mr. Khan to allow  
11 us to do the depositions in Guyana. So, now we were set as to  
12 who we could depose and that was the next step in the process.

13 Q Did Judge Irizarry indicate she wouldn't take cumulative  
14 testimony or a lot of people saying the same thing?

15 A She was very specific not only at the April 28th  
16 conference that we had had with her, but in her order that  
17 there would be no cumulative testimony, meaning she didn't  
18 want people to repeat the same story over and over again.

19 Q Did you receive a decision from Judge Irizarry allowing  
20 you to take the taking of the disposition, granting the motion  
21 you had earlier made?

22 A On June 2nd, 2008 she issued an order.

23 Q Let me show you what's been marked for identification.

24 MR. SHARGEL: I believe there's an agreement of  
25 redaction here as well; is that right, Mr. D'Alessandro?



Si mel s-di rect-Shargel

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1 MR. D' ALESSANDRO: I believe so.

2 Q Let me show you what is mark as S 309-C for  
3 identification and ask you if you recognize the document?

4 A That was the memorandum and order issued by Judge  
5 Irizarry on June 2nd, 2008 granting the Rule 15 motion.

6 MR. SHARGEL: I offer into evidence this document  
7 as I understand, it's been redacted, an agreement to redact.

8 THE COURT: You'll redact out the irrelevant parts.  
9 Received.

10 (So marked.)

11 Q I'll read several relevant parts. On the first page,  
12 this is a formal order of the Honorable Dora Irizarry, United  
13 States District Judge right here in the Eastern District of  
14 New York. It says on the first page for the reasons set forth  
15 below, defendant's Rule 15 motion is granted.

16 I would like to read two other parts. Page 6, the  
17 court concludes that testimony concerning the alleged  
18 hostility is material and reserves its determination on the  
19 cumulative nature of the testimony until completion of the  
20 depositions.

21 On page 7, the order says two prospective witnesses  
22 also purportedly will testify that to their knowledge several  
23 people in Guyana used the nickname Short Man and/or Boss Man,  
24 aliases which are ascribed to Khan in the indictment. This  
25 testimony, too, may be material.

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1 This happened on June 2nd, right?

2 A That's correct.

3 Q You know as a lawyer what material means?

4 A Yes.

5 Q Tell the jury what material means.

6 A The judge was determining it was significant to the  
7 matter, to the case.

8 Q Once Judge Irizarry issued this order on the 2nd of June,  
9 2008, was there any possibility of Selwyn Vaughn being a  
10 witness?

11 A None.

12 Q Why is it that in subsequent conversations right up to  
13 probably July or August that you're using the word "witness"  
14 in connection with Selwyn Vaughn?

15 A Selwyn Vaughn had been described to me from the beginning  
16 as an informant of my client in Guyana. Informants like to be  
17 flattered. They have their importance made known to them on a  
18 continual basis. My client told me he did it with him when he  
19 was an informant. I thought if I continued to tell him he was  
20 going to be a witness, that he would think he was of some  
21 importance and that he would hang around, help us, do what we  
22 needed to do, which is to get somebody of Guyanese background  
23 to look for people in the Guyanese community.

24 Q Whatever you told him, was it ever your intention to have  
25 him get on the witness stand and testify to things that were

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1 false, sir?

2 A Never.

3 Q Was there any effort made by you to keep your  
4 relationship or the meetings that you had with Fineman, not  
5 only on the 13th but going forward, to keep it a secret?

6 A No.

7 Q Are there memoranda that mention meetings with Fineman?

8 A I treated him like I treated the meetings with Nigel  
9 Rodney and every other person we met with, either myself or  
10 Ms. Irving would prepare a memorandum like you've seen before  
11 of every meeting we had. If she weren't around, I might not  
12 prepare the memorandum simply because I don't always prepare  
13 memos.

14 Q E-mails, did you mention Fineman or Selwyn Vaughn in an  
15 e-mail?

16 A Yes.

17 Q Billing records, time recordings, in other words  
18 recording the hours you spent on the case, did they reference  
19 meetings with Fineman?

20 A We had a billing program built into our computer system,  
21 Quick Books. What we would do, even though we had a flat fee  
22 arrangement, flat fee being I told the client we're charging  
23 him a million dollars, you're supposed to pay that, but we  
24 would keep our time; that is, when we would meet with people  
25 so we would show the client what we're doing for them. We

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1 spend two hours meeting with this one or that one. Fineman is  
2 someone we listed when we meet with him, we put it onto the  
3 time records, ship those time records off to Mr. Khan's  
4 brother and to Willems Timber, is the bookkeeper in Guyana and  
5 our bookkeeper and everybody else.

6 Q Are these records of so-called time records kept in the  
7 ordinary course of your business?

8 A They are.

9 Q Is it the ordinary course of your business to keep such  
10 records?

11 A It is.

12 Q As a lawyer, do you have a certain responsibility to keep  
13 records like this?

14 A Yes.

15 Q Are those records subject to inspection by a grievance  
16 committee if someone made a complaint about hours or how much  
17 work you put into the case?

18 A That's correct.

19 Q So they would be available for subpoena or inspection by  
20 any disciplinary committee?

21 A One of the reasons we keep them.

22 Q I show you what's been marked for identification as  
23 Defense Exhibit S 311 for identification. Do you recognize  
24 what these are?

25 A This is a printout, I believe run from the beginning of

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1 2006 through 2008 when we were arrested showing the various  
2 work that had been done by the various attorneys in the  
3 office.

4 Q The back pages, from 44 -- actually before that, the  
5 back pages are blank. Is that because you weren't doing any  
6 work after you got arrested?

7 A That's because we weren't doing any further work after we  
8 were arrested.

9 MR. SHARGEL: I offer S 311 in evidence.

10 THE COURT: Any objection?

11 MR. D'ALESSANDRO: No, your Honor.

12 THE COURT: Received.

13 (So marked.)

14 Q Fineman, we had this in a government exhibit yesterday,  
15 needn't repeat it. Fineman's name appears when you have  
16 meetings with him, correct?

17 A Yes.

18 Q To account for what you did that day on the Roger Khan  
19 case?

20 A Exactly.

21 Q This also, this document also totals up the number of  
22 hours that you and Ms. Irving spent on the case, right?

23 A That's correct.

24 Q That does not include work spent or hours spent by  
25 outside lawyers, right?

Simel s-direct-Shargel

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1 A Right. It included the time spent by  
2 Alexandra Van Doros.

3 Q Who is she?

4 A Another associate in our office.

5 Q When was she there?

6 A She was there until, I think, the summer of 2007,  
7 throughout all of 2006 through December of 2007. Elena  
8 Bernfeld, who was there throughout the fall of 2006.

9 Q According to these --

10 MR. SHARGEL: I'm sorry, did I offer this into  
11 evidence? I think I did.

12 Q According to these records on page 25 --

13 MR. SHARGEL: May I publish page 25?

14 THE COURT: Yes.

15 Q Page 25, the total number of hours spent by people in  
16 your office -- this wasn't Mr. White, Mr. Dubin, any of those  
17 folks?

18 A Wasn't anybody outside my office.

19 Q Was 3747?

20 A Yes.

21 Q Total time?

22 A Yes.

23 Q Spent from August 6th when you were formally retained to  
24 September 10th, 2008, correct?

25 A That's correct.

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1 Q After Judge Irizarry granted the Rule 15 motion, the  
2 exhibit that we saw, the redacted exhibit we saw, at that  
3 point was there any chance of Vaughn being a witness in the  
4 case?

5 A None.

6 Q I want to ask you another question. During conversations  
7 with Selwyn Vaughn, you used the words like "neutralize the  
8 witness," right?

9 A Yes.

10 Q I think there was one where you said the connection with  
11 Clarke, "kill the witness," right?

12 A Yes.

13 Q That was kill the witness with other witnesses?

14 A Kill the witness on cross-examination.

15 Q Have you used these expressions in other cases?

16 A I use them all the time and lawyers use them all the  
17 time. We have continuing legal education programs. Every  
18 year we do cross to kill. One seminar we use, how to  
19 neutralize government witnesses. You could look in any  
20 defense publication, lawyers talk about neutralizing  
21 witnesses. It's a part of the vernacular of being a lawyer.

22 Q Let me show you what is marked as Defense Exhibit 310 D  
23 for identification. I ask you if you recognize this.

24 A I do.

25 Q What do you recognize it to be?

Simel s-direct-Shargel

1343

1 A This is an e-mail I sent to Josh Dubin, co-counsel, jury  
2 consultant on the case and to Darmuid White the legal writer  
3 on the case, co-counsel, on July 15th, 2008 regarding an  
4 individual named recall Rawle Gulliver, G U L L I V E R.

5 MR. SHARGEL: Offer this into evidence, your Honor.

6 THE COURT: Any objection?

7 MR. D' ALESSANDRO: No.

8 THE COURT: Received. S 311.

9 (So marked.)

10 Q This is from you, July 15th, 2008 to Darmuid White and  
11 Josh Dubin, he's a lawyer and jury expert?

12 A Both.

13 Q The subject, Rule 15. Still talking about Rule 15?

14 A I am.

15 Q Because now that the order has been granted, you have to  
16 go ahead and arrange to do it, right?

17 A Yes.

18 Q It says explain to me why we should not advise court we  
19 want to take the deposition of Rawle Gulliver -- his name  
20 hadn't been on the list, correct?

21 A Yes.

22 Q Who kills David Clarke at this point, rather than taking  
23 a chance she won't do it later on, as well as Ramsammy, the  
24 Minister of Health in Guyana?

25 A Yes.



Simel s-direct-Shargel

1344

1 Q Is this, if you could tell us, is this typical of the  
2 kind of language that you would use when you're going to  
3 destroy, neutralize a witness?

4 A They're all interchangeable terms.

5 Q When you said on the tape recorded conversations you're  
6 going to eliminate a witness, were you meaning to actually  
7 visit harm on such a witness?

8 A No.

9 Q Did you ever think that you were sending out Selwyn  
10 Vaughn -- we'll go into more detail about some of these  
11 conversations in a short while -- did you ever think you were  
12 sanctioning the harm to a person?

13 A I didn't think I was sanctioning harm. I didn't think I  
14 was suggesting harm. I thought I was doing to the contrary  
15 with him and I was under the impression from both Mr. Khan and  
16 others I spoke to that he was incapable of doing harm to  
17 anybody.

18 Q While you were meeting with Mr. Vaughn, did you call off  
19 all your investigators because now he said, your Guyanese  
20 investigator, his word, now you have one. He said, do you  
21 recall, June 11th? Did you call off the other investigators?

22 A Throughout all of 2008, during the spring of 2008 when I  
23 was meeting with Selwyn Vaughn, throughout the summer of 2008  
24 up until the day I was arrested, we had Larry Frost and about  
25 ten other investigators around the country continuing to work.

Simel s-direct-Shargel

1345

1 I had the people in Guyana continuing to work on identically  
2 the same subject matters so I was talking to Mr. Vaughn about  
3 and more.

4 Q S 313 --

5 MR. SHARGEL: Is this a government exhibit? Is  
6 there any harm in using this as a defense exhibit rather than  
7 taking time to check, Judge?

8 THE COURT: No.

9 MR. SHARGEL: 535, I don't know if it's -- I know  
10 it's 535. I don't know it's in evidence.

11 THE COURT: It is in evidence.

12 MR. SHARGEL: I'll call it --

13 Q This is June 26th, 2008?

14 A Yes.

15 Q Smack dab in the middle of your relationship with Selwyn  
16 Vaughn, correct?

17 A After three meetings, yes.

18 Q After three meetings with Selwyn Vaughn, Selwyn Vaughn  
19 telling you all the things he's going to be able to do for  
20 you, correct?

21 A Correct.

22 Q This is correspondence in this instance that you received  
23 from Lawrence Frost regarding witnesses, right?

24 A Yes.

25 Q He says in the yellow highlighted places by the

Simel s-direct-Shargel

1346

1 government, but here is the catalogue of my difficulties.  
2 Will visit Stockholm Street, re Sattaur next few days. Have  
3 no intention ever giving up. In other words, you were paying  
4 him to continue working?

5 MR. SHARGEL: Mr. Lipton reminds me there are  
6 highlights. I'm confessing there are highlights.

7 Q Dorminda Gale Lemonier and the address, highlighted,  
8 Leslyn Camacho, see that?

9 A Yes.

10 Q Frost is trying to find her in the summer, correct?

11 A Trying to find her there, in the UN where we believe she  
12 worked over and over again. The only thing he had been able  
13 to accomplish is speaking to her mother.

14 Q It's true, is it not, that the fact you have addresses  
15 doesn't necessarily mean you're going to find the people  
16 there?

17 A You could go there, knock on the door, I'm so and so,  
18 want to speak to so and so. If they don't want to tell you  
19 it's them, you wouldn't know.

20 Q I think one of the witnesses, Ms. Waite from the Queens  
21 facility described Frost as a pudgy white guy?

22 A Fair description.

23 Q But he's telling you he was having trouble finding these  
24 people even though he had the addresses, right?

25 A Yes.

Simel s-direct-Shargel

1347

1 Q Alicia Jagnarain, the same Alicia that you had been  
2 looking for for a long time, right?

3 A I had gone with him to see her tailor.

4 Q Tailor?

5 A Her tailor.

6 Q Tell us about that.

7 A T-A-I-L-O-R. His name was Mario Ramotaur, something like  
8 that, who had been one of the people who put up bail for her  
9 when she got out. We interviewed him, said we want to talk to  
10 Alicia. Please tell her we're trying to reach her and that we  
11 could meet her wherever she wants, at your place of business,  
12 wherever she wants, but we were trying to find and speak to  
13 everybody. Mr. Frost had spoken to her boyfriend,  
14 Andrew Woolworth, then I spoke to Woolworth on the phone, just  
15 tell Ms. Jagnarain we want to talk with her, do it in your  
16 presence, bring her in, however you would like to do it. This  
17 was true with her friends, spoke to Prea Shamlaj (ph).

18 Q The point is that during this period of time when you  
19 were meeting with Selwyn Vaughn, you were still paying on  
20 behalf of the client, private investigators to obtain the  
21 location of these people and further information, right?

22 A Yes, Mr. Frost got \$20,000.

23 Q Let me show you what's been marked in evidence as  
24 Government Exhibit 15. This is already identified as a  
25 photograph of Leslyn Camacho.

Simel s-direct-Shargel

1348

1 A Yes.

2 Q Before you were arrested on September 10th, had you ever  
3 seen a photograph of this woman?

4 A Never.

5 Q Before you were arrested on September 15th, did you ever  
6 hear a description of her?

7 A Never.

8 THE COURT: The arrest?

9 MR. SHARGEL: 10.

10 THE COURT: You said 15.

11 MR. SHARGEL: Getting late.

12 Q In June of '08, it was your style, was it not, to create  
13 lists of things to do, right?

14 A I create every single case a list of the things I want  
15 done by whoever I want them to be done by. The list starts in  
16 the beginning, small, grows and grows. Hopefully, we  
17 accomplish all on the list before trial.

18 Q Do you remember there was a government exhibit that had,  
19 I think, green or orange handwriting of Mr. Vaughn that he  
20 identified a to-do list you had given him on one of the  
21 meetings; you remember that?

22 A Yes.

23 MR. SHARGEL: I'm going to put on the Elmo -- may  
24 I have a number from the government exhibit so I have the  
25 original? What's the number of that exhibit (indicating)?

Si mel s-di rect-Shargel

1349

1 MR. D' ALESSANDRO: 301.

2 MR. SHARGEL: Might I have Government Exhi bi t 301?  
3 We can't see the highl ighti ng on the screen so I'll have to  
4 use thi s.

5 THE COURT: Okay.

6 Q 301-B i n evi dence. We saw thi s?

7 A Yes.

8 Q I'm going to show you for i denti fi ca ti on what's been  
9 marked as S 305-E. Do you recognize thi s document?

10 A Yes, thi s i s my to-do l i s t during the pendency of the  
11 period June unti l July, 2008.

12 Q Which i s the period of time that you were having meetings  
13 June and July of 2008 with Fineman or Selwyn Vaughn, correct?

14 A Yes.

15 Q It's true, i s i t not, looking at --

16 MR. SHARGEL: I offer thi s i n to evi dence, your  
17 Honor.

18 THE COURT: Any ob jec ti on?

19 MR. D' ALESSANDRO: No, your Honor.

20 THE COURT: Recei ved.

21 (So marked.)

22 Q It's true, i s i t not, that thi s S 305-E i ncludes the same  
23 page as contained i n the Government Exhi bi t, Government  
24 Exhi bi t 301-B, ri ght?

25 A Yes.

Simel s-direct-Shargel

1350

1 Q There's just no orange markings here, right?

2 A Correct.

3 Q The complete document from which this was taken by you or  
4 a member of your staff, the complete document has a whole lot  
5 more things to do during this period June/July 2008, right?

6 A That's correct.

7 Q This document which the Frost piece is page 5, this  
8 document goes on for some 13 pages of things that you needed  
9 to do, right?

10 A Correct.

11 Q You weren't sitting back and relying on Selwyn Vaughn,  
12 were you?

13 A To the contrary, we weren't relying upon him at all.

14 MR. SHARGEL: Your Honor, is this a good time?

15 THE COURT: How much more do you have?

16 MR. SHARGEL: Probably another hour.

17 THE COURT: Let's break for the day. You know the  
18 drill. Don't discuss the case. Don't go looking for  
19 information. If you run across a newspaper article or go  
20 online, see a piece, avoid it. Be here before 9:30. We'll  
21 start promptly at 9:30. Have a nice evening. All rise.

22 (Jury leaves courtroom.)

23 THE COURT: Please be seated. I have a few  
24 questions about the charge. You may step down, Mr. Simel s.

25 THE COURT: We'll talk about anything else,

Si mel s-di rect-Shargel

1351

1 scheduling in a minute.

2 There's an affirmative defense built into 1512(e)  
3 which is truly an affirmative defense. It's a burden-  
4 shifting defense. Then there's this thing we were talking  
5 about, 1515(c) which I don't think is an affirmative defense.  
6 In any event, whatever it is, it's not something that shifts  
7 the burden.

8 MR. SHARGEL: Here's my position. May I?

9 THE COURT: I'm not done. I have a question.  
10 Is anybody seeking the burden-shifting instruction?

11 MR. SHARGEL: I am not.

12 MR. SOLANO: I am not.

13 MR. SHARGEL: I would like to say something first.

14 The Second Circuit, the United States against Johnson,  
15 Second Circuit case, fairly old case, I know the  
16 Second Circuit has put a stamp of approval on that section and  
17 has rejected argument it improperly shifts the burden.

18 THE COURT: That one meaning 1512(e).

19 MR. SHARGEL: I'm not requesting it. I want to say  
20 this first. The reason I'm not requesting it is because of  
21 the affirmative defense.

22 There was a suggestion, I don't know, the end of the  
23 day, I don't have it in front of me, either in Judge Sand's  
24 charge book or the Johnson case itself where it was suggested  
25 maybe this is not a good thing for the defense in any criminal



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1 case because it kind of sends the message you have to prove  
2 your conduct was lawful in a day where the prosecution has to  
3 also prove beyond a reasonable doubt that the very same  
4 conduct was unlawful. So, it's sort of mixed up.

5 My first position is that I should be entitled to  
6 that charge but not as an affirmative defense. I understand  
7 you're bound by Second Circuit law. I'm not trying to have  
8 you reinvent the wheel, but I would like to preserve the issue  
9 should review of the case be appropriate.

10 I can't think of anything more clear than the burden  
11 shifting in this case because of the overlapping. Again,  
12 Second Circuit said it's fine.

13 (Continued on next page.)  
14  
15  
16  
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24  
25

SS

OCR

CM

CRR

CSR

Simels - direct - Shargel

1353

1 THE COURT: I don't know what you mean  
2 by "overlappi ng."

3 MR. SHARGEL: Because it's not a situation like  
4 entrapment, where -- or a good-faith defense where the  
5 prosecution proves the element of the charge, and you have the  
6 burden of coming forward with some evidence, and then they  
7 overcome that.

8 This is a situation -- I say "overlappi ng," because  
9 you have to show that the conduct trying to get the truth out  
10 is lawful, through lawful conduct, which really doesn't make  
11 any sense. It's not really a defense if you have to prove  
12 that it's lawful conduct. If you look at the Johnson case,  
13 this argument was made there, and as I said, the Second  
14 Circuit rejected it.

15 So, if I could have that charge in a way that you  
16 would charge good faith in a fraud case, I would take it. But  
17 I'm not going to take it with an affirmative defense and with  
18 an instruction that I have a burden.

19 So, I'm not requesting it.

20 THE COURT: All right.

21 I'm going to give you a proposed charge, a draft.  
22 And I'm 100 percent sure I understand what your application  
23 is. Let me tell you what I presently intend to do, and I  
24 don't -- this still falls in the thinking-out-loud category.

25 I think this 1515(c). This is not an affirmative

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1 defense. It's the thing that says it doesn't prohibit or  
2 punish the providing of lawful, bona fide legal  
3 representation.

4 I think there is more than one way of violating  
5 1512(b), which is our provision. One way is to -- and there's  
6 different mental states here. Whoever knowingly uses  
7 intimidation, threatens or corruptly persuades another person  
8 -- and just to digress for a moment. It might be useful for  
9 us to tell the jury precisely what your theory of the case is,  
10 what it is that the government claims it has proved beyond a  
11 reasonable doubt that falls into the category of intimidation,  
12 threatening and corrupt persuasion. I'm not sure what your  
13 theory is, and I don't mean that in a derogatory way, just  
14 there's a lot of facts.

15 MR. D'ALESSANDRO: Understood.

16 THE COURT: Because the statute builds in an  
17 affirmative defense that we've just been discussing in 1512(e)  
18 that's not lawyer-specific, this affirmative defense is for  
19 anybody, nonlawyers, too, and it seems to cover all of the  
20 conduct prohibited by the statute, in that as long as the  
21 defendant proves by a preponderance of the evidence that the  
22 intimidation, threatening or corrupt persuasion consisted  
23 solely of lawful conduct and it was the defendant's sole  
24 intention to get truthful testimony, then even if you've  
25 proved the elements of the offense, that affirmative defense

Simels - direct - Shargel

1355

1 produces an acquittal.

2 It's a nonlawyer-specific affirmative defense;  
3 right? We all agree on that?

4 MR. D'ALESSANDRO: Yes.

5 THE COURT: It almost seems like a throwaway at the  
6 end. It kind of reminds me of the Bail Reform Act provision  
7 that says, By the way, we're not eradicating the presumption  
8 of innocence here. It's like, Well, of course, you are not.

9 And I actually regard this bona fide legal  
10 representation provision as another way of saying that if a  
11 lawyer is doing that, at the very least I think it amounts to  
12 just an explicit recognition by Congress that if a lawyer is  
13 providing bona fide legal representation, then he or she  
14 obviously can't have the kind of corrupt intent, the corrupt  
15 mental element, in a corrupt-persuasion count. And it's  
16 almost like a good-faith defense to an intent to defraud in a  
17 fraud case. That's kind of the way I regard this, the role it  
18 plays. It seems to me the last thing suggests your agreement  
19 with that, Mr. Shargel.

20 MR. SHARGEL: I agree with that.

21 THE COURT: But I'm not sure how that relates to the  
22 all three ways -- I'm not sure how that dovetails with the  
23 three different ways of violating the statute, because I think  
24 it addresses the corrupt persuasion -- the corrupt part of  
25 corrupt persuasion. I'm not sure what it does to intimidation

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1 or threatening. That's where I have a little conceptual  
2 difficulty.

3 MR. SHARGEL: First, it says nothing in this  
4 chapter, so it's all-enveloping, it would seem to me.

5 THE COURT: Right.

6 MR. SHARGEL: It doesn't single out corruptly  
7 persuades. It says that the chapter doesn't prohibit, which  
8 it would seem to me the plain meaning of that is, everything  
9 in the chapter doesn't prohibit or punish the providing of  
10 bona fide legal-representation services in connection with or  
11 in anticipation of an official proceeding.

12 THE COURT: Well, it would be -- I'm not sure what  
13 you are suggesting. It would certainly be odd to have in a  
14 particular statute an affirmative defense that applies to  
15 everyone trumped later on or altered significantly later on  
16 with regard just to lawyers. It seems to me if -- what you  
17 are suggesting is, 1515(c) essentially does for lawyers what  
18 1512(e) does for everyone, and by doing so prohibits the  
19 burden shifting; is that what you are suggesting? Do you  
20 understand my question?

21 MR. SHARGEL: I understand your question.

22 I argue against the burden shifting, or I argue this  
23 is impermissible burden shifting for another reason. May I  
24 tell you why?

25 THE COURT: Yes.

Simels - direct - Shargel

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1 MR. SHARGEL: Because I have this in front of me  
2 now.

3 It says: A. It's an affirmative defense as to which  
4 the defendant has a burden of proof by a preponderance that  
5 the conduct consisted solely of lawful conduct.

6 Then the second part has to do with what the actor's  
7 intent is to get people to testify truthfully or to cause them  
8 not to testify truthfully. But the problem that I have with  
9 it is: How is a jury told that the government has the burden  
10 of proving beyond a reasonable doubt that the conduct -- and  
11 there's a narrow universe here of conduct by whatever  
12 description -- that the conduct is unlawful, that's the  
13 government burden? And no one is quarreling with that  
14 proposition. The very same conduct which is an element or  
15 ingredient of the crime that they are tasked with proving  
16 beyond a reasonable doubt I have to prove is lawful in order  
17 to avail myself of this rule. That's to me -- that, to me,  
18 makes no sense whatever.

19 THE COURT: See, what I am wondering, though, if we  
20 make this fact-specific and identify the particular factual  
21 scenarios the government says violate 1512. For example, it  
22 might be the case -- I think it's probably the case that the  
23 way this defense works is, let's assume that Robert Simels was  
24 -- threatened someone. Forget Robert Simels -- a lawyer  
25 threatens someone that they are going to bring them to the --

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1 they are going to go to the U.S. Attorney and say, I'm going  
2 to get them to bring perjury charges against you, as a way of  
3 influencing that person's testimony.

4 It seems to me then, he's knowingly used -- he's  
5 knowingly used a threat to influence someone's testimony,  
6 doesn't want him, just to get it specific here, doesn't want  
7 him to say, There's only one Short Man. He wants him to say  
8 there's multiple Short Men. Suppose he threatened to get him  
9 prosecuted. If he really believed -- it strikes me this is  
10 the way the affirmative defense works. You can't do that  
11 threat to influence testimony unless you prove by a  
12 preponderance of the evidence that he really did believe that  
13 this was to get him to testify truthfully.

14 MR. SHARGEL: And-- you can't stop there -- and the  
15 that the conduct is lawful.

16 THE COURT: I don't purport to have the answer to  
17 that right away.

18 I think that's how this works, because "corruptly"  
19 doesn't modify "threat." This business about the bona fide  
20 legal representation strikes me as it fits kind of well when  
21 it comes to corruptly persuades. If the jury finds it's bona  
22 fide legal representation, then it's not corrupt. That  
23 strikes me as easy.

24 But since that mental state doesn't modify the  
25 threaten, it strikes me that this is what a defendant needs to

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1 avail himself of, if it's a situation in which there's an  
2 intimidation, which I guess the government is going to argue  
3 we have here, or a threat. I don't have the answer at the  
4 moment to the solely-lawful conduct.

5 MR. SHARGEL: Well, the cases, including cases that  
6 I have cited to you in writing, the cases say that with  
7 respect to the entire chapter, that the burden -- this is why  
8 it's called an affirmative defense, and I agree with you, it's  
9 really not.

10 THE COURT: 1515(c).

11 MR. SHARGEL: 1515(c) cases say -- there's one in  
12 particular. I don't have the name in mind. I don't have it  
13 before me. It is in my papers. It says that the only burden  
14 the lawyer has is to show that he's licensed to practice law  
15 and he's actually representing the defendant in an actual  
16 proceeding, like we are in this courtroom.

17 So, I respectfully disagree, and I know that you are  
18 just forming your thought and thinking out loud. I'm not  
19 suggesting that we're at the stage of excepting to the charge.  
20 I respectfully disagree that you can take plain language of  
21 Congress and modify it because you don't agree that it should  
22 apply to the whole chapter.

23 THE COURT: That's not what I am saying. I have in  
24 mind principles of statutory interpretation that gives  
25 significance to a cohesive statute that has an affirmative



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1 defense, and something elsewhere that's more general may not  
2 modify that affirmative defense.

3 Let me ask it of you this way: If a lawyer  
4 threatens someone to get him to testify to -- threatens  
5 someone to get him to testify to a version of events the  
6 lawyer believes is false, does that violate this statute?  
7 It's not corrupt persuasion, it's not intimidation. Why  
8 wouldn't that violate this statute?

9 MR. SHARGEL: I think it would violate the statute.

10 THE COURT: Let me finish the thought.

11 If I read 1515(c) the way you want me to, that  
12 doesn't violate the statute.

13 MR. SHARGEL: No. I think that it would violate the  
14 statute. I think that -- as with any fraudulent conduct, with  
15 a good-faith defense, I think what this says -- I don't think  
16 it's all that complicated -- I think what this says, in 1515  
17 now we're talking about --

18 THE COURT: 1515(b).

19 MR. SHARGEL: -- in 1515 B, all that we're talking  
20 about is that -- it's a carve-out, and the chapter doesn't  
21 prohibit or punish the providing of lawful bona fide  
22 legal-representation services in connection with or in  
23 anticipation of an official proceeding.

24 The government is going to argue that what  
25 Mr. Simels did in this case -- let me be specific -- that what

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1 Mr. Simels did was not lawful. And we could quarrel about  
2 bona fide. I strenuously object to the government's  
3 suggestion it has to do with legal ethics.

4 If the government proves that this was not lawful  
5 because it violated this chapter and met the elements of the  
6 offense, then, obviously, this Subsection C would fade away.  
7 It would just simply fade away.

8 THE COURT: Does it violate the statute for a lawyer  
9 to threaten -- a defense lawyer to threaten a witness to get  
10 him to testify falsely?

11 MR. SHARGEL: Falsely. But that's not what we're  
12 talking about here.

13 THE COURT: That's what I'm talking about.

14 MR. SHARGEL: The answer is, yes. If someone  
15 threatens, I'll take the air out of your tires if you don't  
16 get on the stand and tell the story that we both know is  
17 false, of course, that violates the law. I can't quarrel with  
18 that proposition.

19 THE COURT: All right.

20 Well, what is the government going to ask for by way  
21 of a charge? This all may be just academic. Neither  
22 defendant wants this burden-shifting charge. You didn't  
23 request it.

24 MR. D'ALESSANDRO: I think that we're wrestling with  
25 the same dilemma. Borrowing the hypothetical that your Honor

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1 articulated, where you have an attorney who threatens a person  
2 to give perjured testimony, that violates 1512. The question  
3 then becomes, Then how does an attorney avail him or herself  
4 of the affirmative defense, because it would be neither lawful  
5 legal representation nor would it be conduct, lawful conduct,  
6 solely designed for the truth.

7           The problem that we've always been wrestling with is  
8 that proving up -- I understand the statutory construction  
9 that we're in, but proving up a violation of 1512(b)(1), it  
10 does away with the affirmative defense, and then there's no  
11 affirmative defense. We have to prove it twice.

12           There was a case in the papers filed by Mr. Shargel,  
13 there was a case where -- I think it was Eastern District of  
14 Michigan -- the name of the case escapes me, there was  
15 essentially a 2255, because they didn't raise the defense, and  
16 the Court found it ridiculous. It's preposterous that you  
17 avail yourself of the affirmative defense. The person was  
18 charged with attempts to kill another person. I think it  
19 recognized how circular the statute is written.

20           THE COURT: I think it might be useful if, in the  
21 charge for each one, even if it's just short, the charge for  
22 each count, I included the government's theory of the case.  
23 The government alleges that this offense was committed in that  
24 -- where is the indictment? What's the first substantive  
25 count?

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1 MR. D' ALESSANDRO: It would be a conspiracy.

2 THE COURT: Substantive count.

3 MR. D' ALESSANDRO: I'm sorry. It would be Vaughn.

4 THE COURT: What are you going to argue to the jury?

5 MR. D' ALESSANDRO: Would be corruptly persuaded.

6 THE COURT: Corruptly persuaded him to testify  
7 falsely about Short Man, about his job; right?

8 Obviously, if you want a defense theory.

9 MR. SHARGEL: Sure. I will do that.

10 THE COURT: Why don't we frame it for the jury.  
11 Then I intend at this point, unless he talks me out of it, to  
12 address only, either at the beginning or at the end of all of  
13 it, to address only the 15(c) issue, not 1512(e). And to say,  
14 with regard to 1515, that this is just another way of, if it's  
15 a -- if it's a bona fide -- if it's bona fide legal  
16 representation, then by definition, the government has not met  
17 its burden of demonstrating the corrupt intent required by the  
18 statute.

19 If you've got other theories, if these other varied  
20 substantive counts include other theories that are not corrupt  
21 persuasion --

22 MR. D' ALESSANDRO: There are.

23 THE COURT: -- then it might be helpful, once you  
24 articulate what the theory is, for us to discuss at the charge  
25 conference on a more -- in a more fact-specific way what the

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1 defense is, whether you think -- I really would enjoy not  
2 having any burden shifting, and probably will do everything I  
3 can not to have burden-shifting charge.

4 MR. SHARGEL: I'm not going to request it.

5 THE COURT: I know you're not going to. Depending  
6 on what your defense theory is on a particular charge, they  
7 may be entitled to it. You can argue against it. That's the  
8 way this statute may work.

9 MR. D'ALESSANDRO: You've answered my question.

10 THE COURT: All right.

11 This examination has certainly gone on  
12 exponentially.

13 MR. SHARGEL: Taken on a life of its own.

14 THE COURT: Current estimate is what, middle of the  
15 morning tomorrow?

16 MR. SHARGEL: Middle of the morning, I hope. Selwyn  
17 Vaughn was on the stand for two full days. As you may notice,  
18 I'll be here forever if I went at attribution by attribution.

19 THE COURT: I'm going on how long you told me it was  
20 going to take. That's all.

21 MR. SHARGEL: I know. They mis-estimated, as well.

22 Judge, here is what I find very pressing or I feel  
23 pressed: We have a lot to do. Let me just notice a  
24 contextual issue, that this three-week trial is comfortably  
25 fitting into two weeks.

1 THE COURT: You want to sum up Monday, is that what  
2 you're saying?

3 MR. SHARGEL: Yes.

4 THE COURT: Cut to the chase.

5 What about you, how long is his cross going to be?

6 MR. D'ALESSANDRO: I think we should be able to do  
7 it within two hours.

8 THE COURT: All right. What else is there? I  
9 signed a subpoena for some person. You have a witness?

10 MR. SOLANO: I have a witness who is ready to  
11 testify tomorrow. I think -- hold on a second.

12 THE COURT: Who is it? I heard his name today. Who  
13 is it?

14 MR. SOLANO: His name is Justin Kern. The name had  
15 been provided to the government by Mr. Shargel.

16 Does your Honor want to know what his testimony is  
17 going to be? It's not going to be long, probably going to be  
18 fifteen minutes.

19 THE COURT: All right. Say an hour and a half, the  
20 rest of your direct. It takes our cross to the lunch hour.

21 MR. D'ALESSANDRO: Yes, probably.

22 THE COURT: You haven't told me what your preference  
23 is.

24 MR. D'ALESSANDRO: May we confer for a moment?

25 We have no objection to summing up on Monday, your

1 Honor, with what we have ahead of us in order to craft the  
2 charge and for the parties to articulate the theories. There  
3 may be some give and take, I don't know. On that issue. It  
4 may make more sense.

5 THE COURT: All right.

6 MR. SHARGEL: You invited the government or ordered  
7 them to do this, to put their theories with respect to each  
8 one of the counts so we can take a look.

9 Maybe there will be common grounds, but when I put  
10 in our defense theory of the case I'd like to do that in  
11 response to what I get from the government. So if the  
12 government gives us -- when would the charge conference be?

13 THE COURT: Now it seems to me it probably makes  
14 sense to do our charge conference either first thing Thursday  
15 or late tomorrow, depending on when you finish up the  
16 evidence.

17 Maybe it makes sense to do it first thing Thursday  
18 so maybe you can collaborate a little bit and reduce the  
19 number of disagreements's between you. We'll sum up Monday.  
20 That way we can finish all the summations in a day. There is  
21 a lot of talking going on in this case.

22 I may ask you how long you need for your summations.  
23 We're not going to take more than a day for summations. We  
24 have not even had a week of testimony barely till now.

25 MR. SHARGEL: What is really unusual about this case

1 is we're really both arguing the same facts. It's all about  
2 argument, that's what it comes down to.

3 THE COURT: So I will listen to you about how long  
4 you intend to take. We're going to do all our summations in  
5 one day and I'll charge the jury on Tuesday morning. That  
6 will be our plan.

7 MR. SHARGEL: Very well.

8 MR. SOLANO: Thank you, your Honor.

9 THE COURT: All right.

10 (Continued to August 5, 2009.)  
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